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STATE OF ALASKA
THIRD DISTRICT
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA LEGISLATIVE COUNCIL,

Plaintiff,

VS.

GOVERNOR BILL WALKER, in his
official capacity as Governor for the State
of Alaska, and VALERIE DAVIDSON, in
her official capacity as Commissioner of
the Department of Health & Social
Services,

Defendants.

Case No. 3AN-15-09208 CI

**MOTION FOR TEMPORARY RESTRAINING ORDER
OR, IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION**

Plaintiffs hereby move for a temporary restraining order, or in the alternative, a preliminary injunction, pursuant to Alaska R. Civ. P. 65(b), requiring Defendants to immediately halt their plans to implement Medicaid expansion in the State of Alaska. Due to the Governor's announced plan to begin enrolling the Medicaid expansion and accepting federal funding for that population on September 1, 2015, Plaintiff seeks a ruling on this Motion not later than August 31, 2015. As is evidenced by the specific facts set forth in the affidavits attached to the corresponding memorandum, immediate and irreparable injury or damage will result if action is not taken before the Governor begins unilaterally expanding Alaska's Medicaid program on September 1, 2015.

Counsel for Plaintiff has provided notice of this matter to the State of Alaska Department of Law – Civil Division. Plaintiff contends that it has met the standards in Rule 65(b) for issuance of a Temporary Restraining Order, but in the event the court disagrees, Plaintiff seeks a preliminary injunction. This Motion is supported by the attached Memorandum and numerous affidavits of Plaintiff's representatives, as well as other Alaskan residents.

Dated this 24th day of August, 2015, at Anchorage, Alaska.

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*Motions to appear *pro hac vice*
forthcoming

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**MEMORANDUM IN SUPPORT OF
MOTION FOR TEMPORARY RESTRAINING ORDER
OR, IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION**

This case involves a challenge to the Governor's unlawful and unconstitutional attempt to expand Alaska's Medicaid program without legislative approval. As a matter of both state statutory and state constitutional law, the Legislature alone has authority to decide whether additional groups should be eligible for coverage under Alaska's Medicaid program. Yet Governor Walker has announced that he plans to expand the State's program on September 1, 2015, to cover a new group that the Legislature has not approved. The Governor's plan constitutes an end-run around clear statutory constraints and bedrock separation-of-powers principles. The Legislative Council thus seeks a temporary restraining order or preliminary injunction to prevent the immediate and irreparable injury that the Governor will inflict on the State of Alaska.

The Governor's flimsy justification for his unprecedented power grab rests on a flat misreading of state and federal law. As a matter of state law, the Legislature has

authorized Medicaid coverage for all individuals for whom the federal Medicaid statute “requires Medicaid coverage.” For all other groups, express legislative approval is required. The dispute here centers on the group of individuals falling within the Medicaid expansion program that the Affordable Care Act (“ACA”) creates. As initially drafted, the ACA required States to cover that group as a condition of continued eligibility to participate in Medicaid and receive federal funds. But the Supreme Court held that mandatory condition unconstitutional in *National Federation of Independent Business v. Sebelius* (“*NFIB*”), 132 S. Ct. 2566, 2607 (2012), and instead concluded that States must “have a genuine choice whether to participate in the new Medicaid expansion.” To ensure that States would have that “genuine choice,” the Court removed the federal government’s authority to withhold federal funding from States that decline to participate in expansion, thus rendering expansion an option, not a requirement. Since then, numerous States—including Alaska—have exercised their option to decline Medicaid expansion, and none has lost its federal Medicaid funding or eligibility to participate in Medicaid as a result.

According to the Governor, coverage of the Medicaid expansion population nonetheless remains “required” because *NFIB* removed only the federal government’s power to penalize noncompliance with the ACA’s new requirements, not the requirements themselves. That is nonsensical. If coverage of the expansion population is not a condition for continued participation in Medicaid or receipt of federal funding—and the federal government itself has confirmed repeatedly that it is not—then it cannot coherently be understood as something that federal law “requires” the State to do. Indeed, the Governor’s own Attorney General has acknowledged that “States are not required *in practice* to cover” the Medicaid expansion population. That is not because Medicaid expansion is an oxymoronic “optional requirement,” but because it is not a

requirement at all. It is an option, and an option that state law gives the Legislature, not the Governor, the power to decide whether to exercise.

Nonetheless, the Governor has announced his intention to begin enrolling the Medicaid expansion population as early as September 1, 2015. If he does, immediate and irreparable injury will result. The Governor's blatant disregard for the State's Medicaid statute and Constitution are alone enough to establish irreparable harm to both the Legislature and the State's residents. Worse still, the Governor's intention to begin enrolling individuals in a program for which they are not eligible threatens to engender massive confusion and unjustified reliance interests, and to expend scarce resources implementing and administering a state program that ultimately will need to be undone. Accordingly, unless the Governor is willing to represent that he will hold off on implementing his dubious plan until this Court has time to fully adjudicate this case, this Court should grant a temporary restraining order and/or preliminary injunction preventing him from usurping appropriation power that rests solely with the Legislature.

STATEMENT OF FACTS

I. Medicaid And The Affordable Care Act

Medicaid is a cooperative federal-state program through which the federal government reimburses States for a share of their costs if they agree to fund medical assistance to certain qualifying low-income individuals. *See Social Security Amendments of 1965, Title XIX, codified at 42 U.S.C. § 1396 et seq.* At its inception, Medicaid offered federal funding to States that agreed to cover individuals deemed "categorically needy" by virtue of their eligibility for four existing social programs—Aid to Families with Dependent Children, Old Age Assistance, Aid to the Blind, and Aid to the Permanently and Totally Disabled. *See 42 U.S.C. § 1396a(a)(10) (1970).* Over time, Congress amended the federal Medicaid statute to require States that wish to remain eligible to receive federal funding to cover pregnant women and children age 5

and under with family incomes below 133% of the federal poverty level, as well as children between the ages of 6 and 18 with family incomes below the federal poverty level. Although Congress offered States the *option* of covering additional individuals, it did not *require* participating States to cover low-income individuals who do not fit into one of these groups of categorically needy. Accordingly, federal law generally did not require participating States to cover childless adults who are not disabled.

Through the Patient Protection and Affordable Care Act (“ACA”), Pub. L. No. 111-148, 124 Stat. 119 (2010), Congress attempted to dramatically expand the conditions a State must satisfy in order to continue participating in Medicaid and receiving federal Medicaid funding. Rather than impose coverage requirements with respect to only certain categories of low-income individuals, the ACA mandated that States expand their programs to provide coverage to *all* individuals under age 65 with incomes up to 133% of the poverty level, with a 5% “income disregard” provision that effectively raised the level to 138%. *Id.* § 1396a(a)(10)(A)(i)(VIII), (e)(14)(I). Although the federal government initially would fund 100% of the costs generated by providing this new coverage, by 2017, States would be responsible for 5% of those costs, with that responsibility increasing to 10% by the end of the decade. *Id.* § 1396d(y). The ACA also did not offer States any funding beyond the traditional 50% match for administrative costs generated by this expansion. *Id.* § 1396b(a)(2)-(5), (7). Because the ACA structured these new provisions as requirements for continued participation in Medicaid, it was meant to leave States with no choice but to expand their Medicaid programs or forfeit *all* federal Medicaid funds.

II. *NFIB v. Sebelius*

Shortly after the ACA’s enactment, Alaska joined 25 other States in challenging the constitutionality of Congress’ effort to compel States to dramatically expand their Medicaid obligations. The States argued that requiring them to cover this new

population as a condition of continued participation in and eligibility for federal funding under Medicaid amounted to unconstitutional coercion that violated their sovereign right to decide for themselves whether expanding their Medicaid programs in the manner contemplated by the ACA is the right decision for their residents.

The U.S. Supreme Court agreed. *See Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2601 (2012) (opinion of Roberts, C.J., joined in relevant part by Breyer and Kagan, JJ.); *id.* at 2657 (dissenting opinion of Scalia, Kennedy, Thomas, and Alito, JJ. ("joint dissent")).¹ As Chief Justice Roberts explained in his controlling opinion, the ACA was no "mere alteration of existing Medicaid," but rather was an attempt to "enlist[] the States in a new health care program." *Id.* at 2606; *see also id.* at 2666 (joint dissent) (describing Medicaid Expansion as a "new program"). Yet rather than give States "a legitimate choice whether to accept the [new] federal conditions in exchange for federal funds," Congress attempted to force Medicaid expansion upon them by making it a mandatory condition of continued participation in the preexisting Medicaid program and receipt of federal Medicaid funding. *Id.* at 2602-03. In short, Congress engaged in "economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion." *Id.* at 2605. That attempt to deprive States of "a genuine choice whether to participate in the new Medicaid expansion" program, the Court concluded, was unconstitutional. *Id.* at 2607.

Turning to the question of how to remedy that constitutional violation, the Court recognized that nothing "precludes Congress from *offering* funds under the Affordable Care Act to expand the availability of health care, and requiring that States *accepting* such funds comply with the conditions on their use." *Id.* (emphasis added). The constitutional problem arose because Congress attempted to require States to comply with those new conditions (*i.e.*, expand their Medicaid programs) even if, given a

¹ Unless otherwise noted, all reference to *NFIB* are to the opinion of the Chief Justice.

genuine choice in the matter, they would reject both the new conditions and the new funds to which they attached. The Court thus decided that the best way to remedy the constitutional violation was to make the new conditions a requirement only for “a State that has chosen to participate in the expansion” and accept the federal funding that comes with it, not for “States that choose not to participate in that new program.” *Id.*

To that end, the Court held that 42 U.S.C. § 1396c, the statutory provision that gives the Department of Health & Human Services (“HHS”) authority to withhold funds from a State that fails “to comply substantially with any” requirement under the Medicaid Act, could not be applied to withhold funds based on a State’s “failure to comply with the requirements set out in the expansion.” *NFIB*, 132 S. Ct. at 2607; *see also id.* at 2642 (Ginsburg, J., concurring in part, concurring in the judgment, and dissenting in part). “That fully remedie[d] the constitutional violation” because it ensured “that States would have a genuine choice whether to participate in the new Medicaid expansion.” *Id.* at 2607. If a State chooses to participate, then HHS may still invoke section 1396c to withhold funds “provided under the Affordable Care Act if [the] State ... fails to comply with the requirements of that Act.” *Id.* But if a State chooses not to participate in Medicaid expansion, HHS may not treat the State as having failed “to comply substantially with” a provision of the Medicaid Act. *Id.* “As a practical matter, that means States may now choose to reject the expansion; that is the whole point.” *Id.* at 2608.

In the wake of *NFIB*, many States have chosen to do just that. At the moment, 19 States (not including Alaska) have exercised their constitutional prerogative not to participate in Medicaid expansion. *See* Kaiser Family Foundation, *Status of State Action on the Medicaid Expansion Decision*, <http://kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/> (last visited August 24, 2015). The federal government has never suggested that any of these States is in

violation of any of the requirements of the Medicaid statute. To the contrary, both HHS and the Centers for Medicare & Medicaid Services (“CMS”) have recognized repeatedly that, after *NFIB*, participation in Medicaid expansion is an option, not a requirement. *See, e.g.*, Ex. 1, Letter from HHS Secretary Sylvia Burwell to Governor Bill Walker (Mar. 6, 2015) (describing Medicaid expansion as a “coverage category elected at state option” and reiterating that “Alaska *may* take up the Medicaid coverage expansion, and then later drop it *at state option*” (emphasis added)); Ex. 2, Letter from CMS Director Vikki Wachino to Justin Senior, Deputy Secretary of Medicaid for Florida at 4 (May 21, 2015) (“[t]he decision about whether or not to expand Medicaid is a state option”); Ex. 3, Letter from HHS Secretary Sylvia Burwell to Tennessee Governor Bill Haslam (Jan. 23, 2015) (there is “no requirement for a state to maintain coverage for the new adult group”); Ex. 4, HHS, Medicaid Expansion, <http://www.hhs.gov/opa/affordable-care-act/expanded-coverage/medicaid-expansion/> (last visited Aug. 19, 2015) (“[t]he Affordable Care Act gives states new *opportunities* to expand Medicaid” (emphasis added)).

III. Alaska’s Medicaid Statute

Alaska decided to begin participating in Medicaid in 1972. Consistent with the State Constitution and the separation of powers that it contemplates, *see* Alaska Const. art. II, § 1 (only the Legislature may authorize new appropriations); *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 372 (Alaska 2001) (same), that decision was effectuated by the Alaska Legislature, which enacted the State’s Medicaid statute that same year. *See* SLA 1972, ch. 182 § 1.

Mirroring the federal Medicaid statute, the Alaska statute draws a distinction between groups for whom coverage is mandatory and groups for whom it is optional. To ensure that Alaska remains eligible at all times to continue receiving federal Medicaid funding, subsection (a) declares eligible for coverage under the State’s

program “[a]ll residents of the state for whom the Social Security Act requires Medicaid coverage.” Alaska Stat. § 47.07.020(a). Subsection (b) also declares eligible an additional 15 “optional groups of persons for whom the state may claim federal financial participation.” *Id.* § 47.07.020(b). Subsection (d) of the statute states that “[a]dditional groups may not be added unless approved by the legislature.” *Id.* § 47.07.020(d). The basic structure of the Alaska Medicaid statute is therefore straightforward: Any group that the State is required to cover as a matter of federal law in order to remain eligible to participate in Medicaid is automatically eligible for coverage. As for all other individuals, even if federal funding is available to States that decide to cover them, they are eligible for enrollment in Alaska’s program only if they fall within a group expressly approved by the Alaska Legislature.

IV. The Governor’s Efforts to Achieve Medicaid Expansion in Alaska

The population covered by the ACA’s Medicaid expansion—*i.e.*, individuals who are under age 65, have an income level at or below 138% of the poverty level, and for whom coverage was not mandatory before the ACA—are not among the 15 “optional groups” for whom the Alaska Legislature has authorized Medicaid coverage. On March 17, 2015, Governor Walker transmitted bills to the Legislature that would have made those individuals the sixteenth “optional group[] of persons for whom the state may claim federal financial participation” under Alaska Stat. § 47.07.020(b). *See* H.B. 148, 29th Leg. (Alaska 2015). Ex. 5, Press Release, Governor Walker, Governor Walker Introduces Medicaid Bill (Mar. 17, 2015). Ultimately, the Legislature did not pass Governor Walker’s bills or otherwise approve participation for Alaska in Medicaid expansion. Instead, on June 11, 2015, the Legislature passed an appropriations act for the current fiscal year² that expressly provides that none of the funds appropriated for

² Fiscal Year 2016 begins July 1, 2015 and ends June 30, 2016.

Medicaid can be expended on Medicaid expansion. 2015 Alaska Laws 2nd Sp. Sess. Ch. 1, § 1.

Notwithstanding the Legislature's decisions, on July 16, 2015, the Governor informed the Legislative Budget and Audit Committee ("LB&A Committee") that he intends to begin enrolling Alaska residents who fall within the Medicaid expansion population in the State's Medicaid program with or without the Legislature's approval. Although the Governor has no authority to accept federal funds for a new expenditure without approval from the Legislature, he claimed that accepting federal funding to cover the Medicaid expansion population would fall within his authority to accept an increase in federal funding for an existing appropriation item. *See* Alaska Stat. § 37.07.080(h). This is so, according to the Governor, because notwithstanding the Supreme Court's decision in *NFIB*, he views the ACA's expansion population as a group "for whom the Social Security Act requires Medicaid coverage," Alaska Stat. § 47.07.020(a). *See* Ex. 6, Press Release, Governor Walker, Next Steps on Medicaid Expansion Announced (July 16, 2015). The Governor also announced that he would appropriate money from the Alaska Mental Health Trust Account to help cover implementation costs and that the Department of Health and Social Services (DHSS) would assist in implementing the new program. *Id.*

By statute, the Governor must give the LB&A Committee 45 days to review any new expenditure before it may be put into effect. *See* Alaska Stat. § 37.07.080(h). This 45-day stay on the Governor's planned Medicaid expansion expenditure will lapse on August 30, 2015, and the Governor has announced that if, as anticipated, the LB&A Committee takes no action to prevent him from doing so before then, he will begin enrolling the expansion population in Medicaid on September 1, 2015. Ex. 7, Department of Health and Social Services, Healthy Alaska Plan, available at <http://dhss.alaska.gov/HealthyAlaska/Pages/default.aspx> (last visited Aug. 19, 2015).

The Legislative Council believes that the Governor's attempt to unilaterally opt Alaska into Medicaid expansion would violate section 47.07.020(d), the 2016 appropriations act, and the separation of powers that the Alaska Constitution mandates, as the Medicaid expansion population is an optional group that cannot be added to the State's Medicaid program without the Legislature's approval. Accordingly, the Legislative Council has initiated this legal action seeking declaratory and injunctive relief, and now asks this Court to temporarily restrain and/or preliminarily enjoin the Governor from putting his unlawful and unconstitutional plan into effect on September 1, 2015.

STANDARDS OF REVIEW

The Court may enter a temporary restraining order without written or oral notice to the adverse party if two conditions are met:

(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

Alaska R. Civ. P. 65(b).

"The purpose of a preliminary injunction is to maintain the status quo." *Martin v. Coastal Vill. Region Fund*, 156 P.3d 1121, 1126 (Alaska 2007). Alaska courts apply one of two standards to requests for a preliminary injunction. Under the "serious and substantial question" standard, if the plaintiff faces irreparable harm and any potential injury to the defendant "can be indemnified by a bond or ... is relatively slight in comparison to the injury" the plaintiff would suffer without the injunction, the plaintiff must merely "raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit." *State v. Kluti Kaah Native Vill. of Copper Ctr.*, 831 P.2d 1270, 1273 (Alaska 1992) (quotations omitted). "If, however, the plaintiff's threatened harm is less than irreparable or if the opposing

party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a clear showing of probable success on the merits.” *City of Kenai v. Friends of Recreation Ctr., Inc.*, 129 P.3d 452, 456 (Alaska 2006). Here, either standard is satisfied.

ARGUMENT AND CITATION OF AUTHORITIES

In the wake of the Supreme Court’s decision in *NFIB v. Sebelius*, there can be no serious dispute that participation in Medicaid expansion is an option, not a requirement for continued participation in Medicaid. Indeed, as Chief Justice Roberts explained, ensuring that “States may now choose to reject the expansion” was “the whole point” of the Court’s decision. *NFIB*, 132 S. Ct. at 2608. That means that each State’s decision whether to participate in Medicaid expansion must be arrived at through the same legislative and constitutional processes that the State follows when deciding whether to cover any other group for whom Medicaid coverage is optional under federal law. And here, those processes are crystal clear: “Additional groups may not be added [to Alaska’s Medicaid program] unless approved by the legislature.” Alaska Stat. § 47.07.020(d). The Governor’s attempt to add the Medicaid expansion population to Alaska’s Medicaid program without legislative approval is therefore a blatant violation of section 47.07.020(d) and the separation of powers principles that the Alaska Constitution mandates. Accordingly, this Court should stop the Governor from putting that plan into action now, before his unlawful and unconstitutional actions result in immediate and irreparable injury to the Legislature and the people of Alaska.

I. The Legislative Council’s Challenge To The Governor’s Attempt To Unilaterally Opt Alaska Into The ACA’s Optional Medicaid Expansion Program Is Likely To Succeed On The Merits.

Since its inception, the federal Medicaid program has provided participating States funding for groups of individuals falling into two categories: (1) required groups that a State *must* cover as a condition of participation in Medicaid and receipt of federal

funding, and (2) optional groups that a State *may* cover if it wants to receive *additional* federal funding, but need not cover to remain eligible for continued participation and receipt of federal funding. *See Schweiker v. Gray Panthers*, 453 U.S. 34, 37 (1981). Alaska's Medicaid statute maps onto these two categories, drawing a clear line between residents "for whom the Social Security Act *requires* Medicaid coverage," Alaska Stat. § 47.07.020(a) (emphasis added), and "optional groups of persons for whom the state *may* claim federal financial participation," *id.* § 47.07.020(b) (emphasis added). To ensure that the State remains eligible to continue participating, the statute automatically authorizes coverage for anyone falling into the "required" category. But for any group that does not fall into that category, coverage is available only if that "optional group" is expressly authorized by the Legislature. And "[a]dditional groups may not be added" to the statutorily enumerated list of optional groups "unless approved by the legislature." *Id.* § 47.07.020(d).

There is no question that the group of individuals for whom federal funding is available under the ACA's Medicaid expansion program is not one of the 15 "optional groups" enumerated in section 47.07.020(b). If they are to be covered under Alaska's program, then, they must qualify as a group "for whom the Social Security Act requires Medicaid coverage." Alaska Stat. § 47.07.020(a). They plainly do not. As the Supreme Court, the relevant federal agencies, numerous States, and the Governor himself have recognized, States are no longer required to cover the Medicaid expansion population after the Court's decision in *NFIB*. The Governor's attempt to unilaterally extend Medicaid coverage to the expansion population thus amounts to an unlawful and unconstitutional attempt to usurp the Legislature's prerogative to decide whether to accept the federal government's invitation to participate in Medicaid expansion.

A. As the Supreme Court, the Federal Government, and Other States Agree, Participation in Medicaid Expansion Is Optional, Not Required, After *NFIB*.

When construing a statute, courts “look to the meaning of the language, the legislative history, and the purpose of the statute in question. The goal of statutory construction is to give effect to the legislature’s intent, with due regard for the meaning the statutory language conveys to others.” *Gov’t Emps. Ins. Co. v. Graham-Gonzalez*, 107 P.3d 279, 284 (Alaska 2005) (quotation omitted). Unless the statute’s “words have acquired a peculiar meaning, by virtue of statutory definition or judicial construction, they are to be construed in accordance with their common usage.” *Id.* The language and purpose of section 47.07.020(a) is clear. By rendering eligible for Medicaid only those Alaska residents “for whom the Social Security Act requires Medicaid coverage,” the statute renders eligible only those residents that the State *must* cover in order for Alaska to continue participating in Medicaid and receiving federal Medicaid funding. The scope of section 47.07.020(a) thus necessarily depends on the scope of the Social Security Act and the requirements that it imposes in order for a State to remain eligible to participate in Medicaid and receive federal Medicaid funding.

Ordinarily, that inquiry would start with the text of the Social Security Act, and here in particular with the text of that federal statute as amended by the ACA. And looking at the statutory text, one understandably might come to the conclusion that covering the Medicaid expansion population is a requirement, not an option. *See* 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII). But that conclusion would be profoundly mistaken after the Supreme Court’s decision in *NFIB*, the core holding of which was that the federal government cannot make participation in the expansion program a mandatory condition of participation in Medicaid without violating the U.S. Constitution. As the Court explained, States instead must be given “a genuine choice whether to participate in the new Medicaid expansion,” and forcing them to choose between expansion or

opting out of Medicaid entirely gives them no true choice at all. *NFIB*, 132 S. Ct. at 2607; *see also, e.g., id.* at 2608 (same). The Court thus held the ACA unconstitutional to the extent that it *required* States to participate in Medicaid expansion in order to continue participating in Medicaid, and remedied that constitutional violation by removing HHS's authority to withhold federal funding from States that decline to participate in the new program. "As a practical matter, that means States may now choose to reject the expansion; that is the whole point." *Id.*

Consistent with that understanding, more than a third of the States have declined to participate in Medicaid Expansion after *NFIB*. *See Status of State Action on the Medicaid Expansion Decision*, <http://kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/> (last visited August 22, 2015). While that decision means that those States are not eligible for the *new* federal funding that the ACA makes available to participating States, it has had no effect whatsoever on the eligibility of those States to continue participating in traditional Medicaid. The federal government has never suggested that those States are violating any federal Medicaid requirement; to the contrary, it has continued to treat them as fully eligible to participate in Medicaid and receive federal Medicaid funding. As both HHS and CMS have confirmed when addressing questions that have arisen in the wake of *NFIB*, that is because "[t]he decision about whether or not to expand Medicaid *is a state option*," not a requirement. Ex. 2, Letter from CMS Director Vikki Wachino to Justin Senior, Deputy Secretary of Medicaid for Florida (May 21, 2015); *see also, e.g.,* Ex. 1, Letter from HHS Secretary Sylvia Burwell to Governor Bill Walker (Mar. 6, 2015); Ex.3, Letter from HHS Secretary Sylvia Burwell to Tennessee Governor Bill Haslam (Jan. 23, 2015).

HHS has even confirmed as much to Alaska directly: When Governor Walker asked whether Alaska could later opt out of Medicaid Expansion if it were to decide to

opt in, Secretary Burwell herself reiterated in her response that a State is free to “take up the Medicaid coverage expansion, and then later drop it” because the Medicaid expansion population is a “coverage category *elected at state option*,” not required by federal law. *See* Ex. 1 (emphasis added). Shortly after receiving that confirmation from Secretary Burwell, the Governor, too, recognized that Medicaid expansion is now optional, not required, introducing legislation that, if adopted, would have added the Medicaid expansion population as the sixteenth of section 47.07.020(b)’s “optional groups.” *See* H.B. 148, 29th Leg. (Alaska 2015). Of course, there would have been no need to add that group if it were already a group “for whom the Social Security Act requires Medicaid coverage.” Alaska Stat. § 47.07.020(a). In seeking the Legislature’s approval, the Governor thus recognized what the Supreme Court, HHS, CMS, and every other State has recognized as well—namely, that States now “have a genuine choice whether to participate in the new Medicaid expansion.” *NFIB*, 132 S. Ct. at 2607.

B. The Governor’s Contrary Position Rests on a Nonsensical Misreading of the Supreme Court’s Decision in *NFIB*.

Notwithstanding that unanimous consensus and his own past acts demonstrating agreement with it, the Governor now claims that he can opt Alaska into Medicaid expansion with or without the Legislature’s approval because, contrary to all appearances, participation in Medicaid expansion still remains “required” under federal law. The Governor has acknowledged (as he must) that “states are not required *in practice* to cover this expanded group of beneficiaries.” Ex. 8, Letter from Attorney General Craig Richards to Senator John Coghill (July 31, 2015). But he nonetheless maintains that they are “required” to do so as a legal matter because *NFIB* did not eliminate the requirement to participate in Medicaid expansion; it just eliminated HHS’s authority to do anything to a State that violates that requirement. *Id.* That convoluted reasoning finds no support in law or logic. As a matter of common sense, a State cannot

be both “required” and “not required” to expand its Medicaid program. Nor can a State “have a genuine choice whether to participate in the new Medicaid expansion,” *NFIB*, 132 S. Ct. at 2607, if it still remains “required” to do so.

The Governor attempts to defend the oxymoronic view that expansion is an “optional requirement” by insisting that *NFIB* eliminated only HHS’s authority to penalize States for failure to comply with the ACA’s new requirements; it did not eliminate the requirements themselves. Thus, in his view, States are still “required” to participate in Medicaid expansion; HHS just lacks any “enforcement mechanism” if they fail to do so. *See* Ex. 8, Letter from Attorney General Craig Richards to Senator John Coghill (July 31, 2015). That makes no sense. The federal Medicaid statute is a spending power statute. It does not “require” States to do anything in the abstract. It only “requires” States to do things *if they want to continue participating in Medicaid*. The inquiry into whether something is “required” under the federal statute thus cannot be divorced from the inquiry into what a State must do in order to remain eligible to continue participating Medicaid and receiving federal funding. If failure to abide by a purported “requirement” has no impact on a State’s continued eligibility to participate in Medicaid and receive federal funds, then as a matter of both law and logic, is not is not really a “requirement.” *Compare Black’s Law Dictionary*, Requirement (10th ed. 2014) (“requirement ... Something that must be done because of a law or rule”), *with* *Black’s Law Dictionary*, Option (10th ed. 2014) (“option ... The right or power to choose”). By removing HHS’s authority to penalize a State for failure “to comply” with the ACA’s “requirement” to expand Medicaid, 42 U.S.C. § 1396c, the Court thus necessarily eliminated the requirement itself.

That commonsense point was not lost on the Supreme Court when it crafted its remedy in *NFIB*. If it were, then the Court would not have reiterated—repeatedly—that States now “have a genuine choice whether to participate in the new Medicaid

expansion.” *NFIB*, 132 S. Ct. at 2607; *see also, e.g., id.* at 2608 (States have “a genuine choice whether to” participate); *id.* (“States may now choose to reject the expansion”). The Court’s chosen remedy just reflects the realities of the situation it faced. While the Court wanted to ensure that HHS could no longer impose the ACA’s new requirements on States that chose *not* to participate in Medicaid expansion, it also wanted to leave those requirements intact for States that “voluntarily sign up” for the new program. *Id.* To achieve that end, the Court removed HHS’s authority to invoke those requirements as a basis to penalize States that declined to participate in the new program, but left the requirements in the statute so that HHS would still have the legal authority to “withdraw funds provided under the Affordable Care Act if a State that *has* chosen to participate in the expansion fails to comply with the requirements of that Act.” *Id.* at 2607 (emphasis added).

The Governor thus searches for a loophole that does not exist. The Supreme Court was not trying to create some sort of novel unenforceable condition on the receipt of federal Medicaid funding; it was just trying to find the easiest path to preserving the new requirements for States *participating* in the new program while eliminating them for *non-participating* States. That is the only way to make sense of the Court’s repeated statements that, as a consequence of its remedy, “States may now choose to reject the expansion.” *Id.* at 2608. If all States still remain “required” to participate in Medicaid expansion as a condition of continued participation in Medicaid, then the Court’s decision would fail to remedy the constitutional violation it identified—namely, the attempt to deprive States of a “genuine choice” in the matter. *Id.* The Governor’s attempt to divorce the Court’s remedy from its holding thus would reintroduce the same constitutional problem that *NFIB* identified. In short, there is no coherent way to read *NFIB* as leaving in place a “requirement” that the Court held unconstitutional. Nor is

there any coherent way to read section 47.07.020(a) as requiring Alaska to cover a group that the Supreme Court has held that States are no longer required to cover.

C. Because Medicaid Expansion Is Optional, the Governor May Not Opt Alaska in Without Legislative Approval.

Because the federal Medicaid statute no longer requires States to cover the Medicaid expansion population as a condition of continued participation in Medicaid, that population can no longer be treated as a group “for whom the Social Security Act requires Medicaid coverage.” Alaska Stat. § 47.07.020(a). Instead, it is an “optional group” that cannot be covered “unless approved by the legislature.” *Id.* § 47.07.020(d). Indeed, the Governor himself initially recognized as much when he asked the Legislature to add that population as the statute’s sixteenth “optional group.” The Governor changed his position only after the Legislature declined to take him up on that invitation. But the Governor does not get to ignore the Legislature’s express reservation of legislative prerogative to decide which “optional groups” should be eligible for Medicaid coverage just because he disagrees with the Legislature’s policy choices.

Nor can the Governor get around that statutory prohibition on unilateral action by averting to some professed distinction between “required” under federal law and “required” under state law. Section 47.07.020(a) uses the term “required” in specific reference to federal law, authorizing coverage for those individuals “for whom *the Social Security Act* requires Medicaid coverage.” Alaska Stat. § 47.07.020(a) (emphasis added). The state statute thus necessarily incorporates the requirements of the federal statute, as interpreted or altered by the U.S. Supreme Court. *See Native Vill. of Tununak v. State, Dep’t of Health & Soc. Servs., Office of Children’s Servs.*, 334 P.3d 165, 171-72 (Alaska 2014) (“The United States Supreme Court’s decisions on issues of federal law, including issues arising under the Federal Constitution, bind the state courts’ consideration of those issues.”); *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503

(2012) (once the Supreme Court has weighed in on a federal statute, “it is the duty of other courts to respect that understanding of the governing rule of law”). And here, the Supreme Court’s definitive ruling as to what “the Social Security Act requires” is that it does not require States to expand their programs to the levels contemplated by the ACA. As a matter of both federal and state law, then, the expansion population is not a group “for whom *the Social Security Act* requires Medicaid coverage.” Alaska Stat. § 47.07.020(a) (emphasis added).

To the extent there were any doubt on that score as a matter of state law, the Legislature eliminated it by expressly prohibiting the Governor from using funds appropriate for Medicaid to fund Medicaid expansion. *See* 2015 Alaska Laws 2nd Sp. Sess. Ch. 1, § 1. That prohibition not only confirms the Legislature’s understanding that the expansion population is not a “required” group, but also independently prohibits the Governor from moving forward with his plan to expend funds that have not been appropriated on a program that has not been approved.

The Governor’s plan also runs head-on into “the separation of powers and its complementary doctrine of checks and balances [that] are part of the constitutional framework of this state.” *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 34-35 (Alaska 2007). The Alaska Constitution gives “the legislature, and *only* the legislature, ... control over the allocation of state assets among competing needs.” *City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153, 1156 (Alaska 1991); *see also* Alaska Const. art. II, § 1. The Governor usurps that “legislative appropriation power” not only when he attempts to appropriate funds unilaterally, but also when he “[a]lter[s] the purpose of [an] appropriation,” *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 372 (Alaska 2001). Here, the Governor is attempting to do both, as he plans to bring funding Medicaid expansion in the face of an appropriations act that expressly prohibits him from using appropriated funds for that purpose, and to

do so under a theory that is irreconcilable with the manifest intent of the appropriation that the Legislature *has* made. The purpose of the appropriation of funding to cover groups “for whom the Social Security Act requires Medicaid coverage” is clear: The Legislature wanted to appropriate the funds necessary to ensure that Alaska remains in compliance with all conditions on continued participation in and receipt of federal funding under Medicaid. It did not want to divest itself of its constitutional power to make decisions about whether to appropriate funding for groups for whom coverage is *not* required under federal law.

To interpret section 47.07.020(a) as empowering the Governor to declare groups “required” when they are not really so thus would usurp not just the Legislature’s statutory power, but its constitutional power as well. *See State v. Sundberg*, 611 P.2d 44, 50 n.16 (Alaska 1980) (recognizing a “court’s duty to reasonably construe statutes, whenever possible, to avoid the dangers of unconstitutionality”). The Legislature’s clear intent in section 47.07.020(d) was to preserve its constitutional power to decide whether to appropriate funding for new “optional groups” like the Medicaid expansion population. The Legislature confirmed as much when it expressly denied the Governor power to use funds appropriated for Medicaid to pay for Medicaid expansion. Accordingly, if the Governor wants a new appropriation of funding to extend Medicaid coverage to that new group, then just as with any other new appropriation, he is free to try to convince the Legislature to give him one. But if the Legislature denies that request, the Governor does not get to go it alone. Put simply, the Alaska Constitution does not permit the Governor to exercise “a quasi-legislative appropriation power permitting appropriations the legislature never enacted.” *Knowles*, 21 P.3d at 372. The Governor’s attempt to do so is a patent violation of section 47.07.020(d), the 2016 appropriations act, and the Alaska Constitution.

II. A Temporary Restraining Order And/Or Preliminary Injunction Is Manifestly Appropriate Under the Circumstances at Hand.

As the foregoing confirms, there is no reason to allow the Governor's unilateral multi-million-dollar Medicaid expansion to move forward at all, let alone to allow it move forward before this Court has time to fully consider the Legislative Council's statutory and constitutional challenges. Accordingly, unless the Governor is willing to represent that he will hold off on his plan to begin enrolling the expansion population and accepting federal funding to cover it on September 1, 2015, the Court should enter a temporary restraining order and/or preliminary injunction preserving the status quo until the Court has had the opportunity to fully consider and resolve the Legislative Council's claims. Any harm that the Governor might claim to suffer from such relief pales in comparison to the irreparable injury that preserving the status quo will prevent.

Both the Legislative Council and the people of Alaska will suffer immediate and irreparable injury if the Governor proceeds with his plan to unilaterally expand Alaska's Medicaid program. As numerous state courts have recognized, a violation of a state statute constitutes a per se irreparable injury. *See, e.g., SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 508 (Pa. 2014) ("where the offending conduct sought to be restrained through a preliminary injunction violates a statutory mandate, irreparable injury will have been established"); *State v. Econ. Freedom Fund*, 959 N.E.2d 794, 804 (Ind. 2011) ("if the action to be enjoined clearly violates a statute, the public interest is so great that the injunction should issue regardless of whether a party establishes 'irreparable harm' or 'greater injury'"); *Jurisich v. Jenkins*, 749 So. 2d 597, 599 (La. 1999) ("petitioner is entitled to injunctive relief without the requisite showing of irreparable injury when the conduct sought to be restrained is unconstitutional or unlawful"). Because the Governor's plan plainly violates section 47.07.020(d) and the 2016 appropriations act, that alone is enough to establish irreparable harm sufficient to warrant injunctive relief.

The separation-of-powers interests at stake make that injury all the more acute. As the Alaska Supreme Court has explained, the separation-of-powers principles embodied in the Alaska Constitution serve “two principal purposes: first, to protect the liberty of the citizen; and second, to safeguard the independence of each branch of the government and protect it from domination and interference by the others.” *Bradner v. Hammond*, 553 P.2d 1, 6 n.11 (Alaska 1976). By attempting to usurp the Legislature’s appropriations power, the Governor thus violates the rights not just of the Legislature, but of the Alaska citizenry. Again, that alone is enough to warrant injunctive relief. *See Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”); *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977) (“Planned Parenthood’s showing that the ordinance interfered with the exercise of its constitutional rights and the rights of its patients supports a finding of irreparable injury.”); *Alsworth v. Seybert*, 323 P.3d 47, 55 (Alaska 2014) (holding that limiting defendants’ First Amendment rights “imposes serious harm” on defendants); *cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976).

And the harms to the State and its residents do not end there. If the Governor’s plan goes into effect on September 1, then the State will immediately begin enrolling residents in a Medicaid program for which they are not eligible. Doing so threatens to engender massive confusion and foster unfounded reliance interests on the part of the Alaskans who will be given the erroneous impression that they are covered by Medicaid when that is not, in fact, so. *See* Ex. 9, Aff. Rep. Mike Chanault ¶ 19; Ex. 10, Aff. Sen. Pete Kelly ¶ 12; Ex.11, William Streur ¶ 14. And should coverage actually begin to flow only to later be determined unlawful, the Governor’s actions could result in an administrative nightmare in which providers are billing Alaska’s Medicaid program for patients and care that it does not cover. *See* Ex. 10, Aff. Sen. Pete Kelly ¶ 12. Moreover,

Alaska's Medicaid program is already stretched thin. *See* Ex. 12, Aff. Linda Giani ¶¶ 3-4; Ex. 13, Aff. Bertha Jarvi ¶¶ 4-6; Ex. 10, Aff. Sen. Pete Kelly ¶ 9; Ex. 14, Amy Oney ¶ 4. The stress to the system of adding—and later removing—tens of thousands of beneficiaries threatens to significantly diminish the quality of care available to current Medicaid beneficiaries. *See* Ex. 13, Aff. Bertha Jarvi ¶¶ 4-6; Ex. 10, Aff. Sen. Pete Kelly ¶ 9; Ex. 11, Aff. William Streur ¶¶ 8, 14. Patients and providers alike thus stand to suffer irreparable injury if the Governor is allowed to move forward with his plan to begin implementing coverage for the expansion population without the necessary legislative approval on September 1.

That injury is compounded by the irreparable fiscal injury to the State. Each dollar that the Governor diverts to implementing Medicaid coverage that is not authorized by state law is a dollar that could have gone to a State program that the Legislature actually has authorized. The Alaskans who stand to benefit from the expenditure of funds on those *authorized* programs thus will inevitably be injured by the Governor's attempt to implement an unauthorized expansion of Medicaid. *See* Ex. 9, Rep. Mike Chenault ¶¶ 7-8, 18; Ex. 13, Aff. Bertha Jarvi ¶¶ 4-6; Ex. 15, Aff. Rep. Johnson ¶ 11; Ex. 16, Aff. Laura Clark-Maketa ¶ 3; Ex. 17, Aff. Sen. Anna McKinnon ¶¶ 12, 15. The Governor's plan to divert \$1.6 million from the Mental Health Trust Authority Account to pay for administering that new coverage is particularly problematic. That money, which must be used to promote mental health programs for vulnerable Alaskans or, if not needed for that purpose, sent to the general fund for legislative appropriation, *see* Alaska Stat. § 37.14.035(a), (b), would instead be lost to implementing and administering an unlawful unilateral executive initiative, causing irreparable harm to the beneficiaries of the Trust. *See* Ex. 10, Aff. Sen. Pete Kelly ¶ 8; Ex. 11, Aff. William Streur ¶ 10. Moreover, most of this money would be spent providing benefits to individuals who are not beneficiaries of the Trust.

Put simply, the State's budget is already constrained enough as it is. *See* Ex. 9, Aff. Mike Chenault ¶¶ 7-8; Ex. 10, Aff. Sen. Pete Kelly ¶ 7; Ex. 17, Aff. Sen. Anna McKinnon ¶¶ 8-9, 12, 15; Ex. 18, Rep. Charisse Millett ¶¶ 11, 14. The Governor should not be diverting scarce resources to implementing and administering unilateral executive action that ultimately will need to be unwound.

Preliminary relief does not pose any substantial harm to the Governor. This case presents straightforward issues of statutory and constitutional interpretation that can be resolved quickly, and the Legislative Council stands ready to move forward on whatever schedule this Court deems appropriate. If the Governor is correct that he has had the authority to opt into Medicaid Expansion since he assumed office in January 2015, then he will not suffer any significant harm by having to wait another month to implement his plan. Thus, any injury to the Governor "is relatively slight in comparison to the injur[ies]" the Legislature and the State will suffer if the Governor's Medicaid expansion plan is implemented before this Court examines the shaky legal grounds on which it rests. *N. Kenai Peninsula Rd. Maint. Serv. Area v. Kenai Peninsula Borough*, 850 P.2d 636, 639 (Alaska 1993). Accordingly, the Court should grant the Legislative Council's motion for a temporary restraining order and/or preliminary injunctive relief.

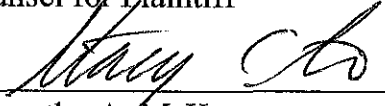
CONCLUSION

For the foregoing reasons, Plaintiff Alaska Legislative Council asks this Court to prevent immediate and irreparable damage to the Council, the Legislature, and the citizens of Alaska by issuing a temporary restraining order or preliminary injunction that enjoins Governor William Walker and Department of Health & Social Services Commissioner Valerie Davidson from enrolling Alaska residents within the expansion population in Alaska's Medicaid program, accepting federal funding for Medicaid coverage for that expansion population, expending state resources on implementing coverage for that population, or otherwise implementing or administering Medicaid

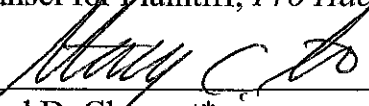
expansion without the express approval of the Alaska Legislature until this Court decides the merits of this case.

Dated this 24th day of August, 2015, at Anchorage, Alaska.

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THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

MAR - 6 2015

The Honorable Bill Walker
Governor of Alaska
Juneau, AK 99811

Dear Governor Walker:

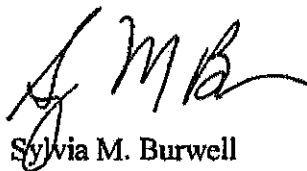
Thank you for your efforts regarding Medicaid expansion in Alaska. In follow up to our staffs' discussions, I wanted to provide you with the following information on the Medicaid coverage expansion provision of the Affordable Care Act.

As you know, the law provides that the federal government will pay 100 percent of the amounts expended by the state for medical assistance for such newly-eligible adult beneficiaries through 2016. The federal contribution gradually declines beginning in 2017, but it is never less than 90 percent of the cost of care. In previous guidance, we notified states of the opportunity to extend coverage, and the absence of federal financial penalties if a state does not do so, or if it does so and later drops such coverage. See question and answer 25 of the Frequently Asked Questions on Exchanges, Market Reforms and Medicaid, issued on December 10, 2012, and available at: <http://www.cms.gov/CCIIO/Resources/Files/Downloads/exchanges-faqs-12-10-2012.pdf>.

Consistent with that guidance, Alaska may take up the Medicaid coverage expansion, and then later drop it at state option. There is no requirement for a state to maintain coverage for the new adult group. We generally encourage states that eliminate any coverage category elected at state option to plan for a smooth transition process for phasing out that coverage. For that reason, states' 1115 demonstrations include a standard phase out term and condition. This includes requiring that any individuals who may continue to be eligible for Medicaid in other eligibility categories are notified and given the opportunity to continue coverage through that alternative category. We also note that if Alaska expands Medicaid coverage and then drops such coverage at a later point, there would be no resulting financial penalty and no reduction to the federal matching dollar rates otherwise available to Alaska for its Medicaid program.

I hope this information is useful in your efforts to help low-income Alaska residents gain coverage and to reduce uncompensated care for Alaska health care providers. Please do not hesitate to contact me if you have any further thoughts or concerns.

Sincerely,



Sylvia M. Burwell



MAY 21 2015

Justin Senior
Deputy Secretary for Medicaid
State of Florida
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 8
Tallahassee, FL 32308

Dear Mr. Senior:

This is a follow up to recent conversations between the Centers for Medicare & Medicaid Services (CMS) and the state about a proposed funding level and approach to Florida's Low-Income Pool (LIP). On April 20th, Florida posted a "Low Income Pool Amendment Request" for public comment. CMS has conducted a preliminary review of the proposal, for which the state public comment period will soon close. We plan to review the state's official proposal and the public comments that the state has received before reaching a final determination on the LIP. However, in recognition of the state's request for timely feedback as well as the Florida legislature's calendar and time frames for resolving a fiscal year 2015-2016 budget, we are prepared at this point to provide preliminary feedback on this proposal.

Overview

CMS believes that a level of ongoing LIP support consistent with the principles articulated in our April 14, 2015, letter will be best implemented through a phased-in approach. Subject to review of the state's official proposal and public comments, and further conversations with you and your colleagues, we have preliminarily concluded that 2015-16 funding should be at approximately \$1 billion, consistent with the funding level for the LIP prior to 2014, to maintain stability while the system transitions. Funding in subsequent years at a more sustainable and appropriate level to cover the state's remaining uncompensated care costs would be approximately \$600 million. We note that this level of funding for the LIP, coupled with the options the state may elect at its discretion described in this letter, would enable Florida to retain Medicaid investment in the state at or above the current \$2.16 billion level of LIP funding. In addition, the option to expand Medicaid to low-income adults remains available to the state, and as described later in this letter, could provide an estimated revenue increase of \$2 billion annually to the Florida hospitals over and above funding through sources such as the LIP.

Background

When CMS agreed to a temporary one-year extension of the LIP in 2014, CMS made clear that it expected Florida would use the year to develop reformed Medicaid payment systems and funding mechanisms that would ensure quality health care services to Florida's Medicaid beneficiaries throughout the state so that starting in state fiscal year 2015 Florida would move

toward Medicaid payments directly to providers rather than payments through the LIP. Since then, CMS has reaffirmed that the LIP program would not continue after June 30, 2015, in its current form.

From its inception in 2006 until 2013, LIP funding was capped at \$1 billion each year. In 2014, as you know, in our one-year extension of the LIP, CMS increased the amount of the LIP by \$1.16 billion at the state's request because the state was moving to statewide managed care. Prior to this, the state had the authority to make additional payments based on fee-for-service payments under its state plan. CMS allowed the state to temporarily make provider payments through the LIP while the state determined how to appropriately transition provider payment to rates through a new managed care system. This transition was completed late in 2014; as discussed below, however, the state has not proposed significant changes to the structure of the LIP to recognize this change.

CMS' April 14, 2015, letter laid out the three principles by which CMS intends to review proposals relating to the extension of the LIP. CMS intends to apply these principles to uncompensated care pools in all states. Specifically, we noted that coverage is the best way to secure affordable access to health care for low-income individuals and uncompensated care pool funding should not pay for costs that would be paid for in a Medicaid expansion; that Medicaid payments should support services provided to Medicaid beneficiaries and low-income uninsured individuals; and that provider payment rates must be sufficient to promote provider participation and access, and should support plans in managing and coordinating care. These principles are consistent with the concerns that we have expressed over time regarding Florida's approach to provider payment and the need for reforms.

Preliminary Review of LIP Proposal Florida Posted for Public Comment

As noted above, CMS conducted an initial review of the LIP proposal that the state posted for public comment on April 20, 2015, and conducted two conference calls with the state to better understand this proposal. While we appreciate that this proposal makes modifications to the current LIP, and plan to review public comments and the official proposal before we reach a final determination, it is our preliminary conclusion that this proposal makes only limited progress toward realizing the principles we articulated in April.

***Principle:** Coverage rather than uncompensated care pools is the best way to secure affordable access to health care for low-income individuals, and uncompensated care pool funding should not pay for costs that would be covered in a Medicaid expansion.*

The state has recently said that it is "willing to size LIP so that it would not duplicate or serve as a substitute for Medicaid expansion."¹ The proposal, however, makes no reduction in the overall

¹ *Scott v. HHS*, No. 15-00193 (N.D. Fla. May 7, 2015)(Pls' Mem. Supp. Prelim. Inj.); *see also* <http://www.flgov.com/wp-content/uploads/2015/05/050715.pdf>. See also Amendment Request for Florida's 1115 Managed Medical Assistance Waiver (Powerpoint presented by Justin Senior at the April 29, 2015 Medical Care Advisory Committee and Public Meeting Orlando, Florida). Available at: http://ahca.myflorida.com/medicaid/statewide_mc/pdf/mma/Presentation_Orlando_Public_Meeting_2015-04-29.pdf.

size of the pool to account for the potential effects of expanded coverage through Medicaid or to account for the increase in coverage for those who became insured through the Marketplace.

Principle: Medicaid payments should support services provided to Medicaid beneficiaries and low-income uninsured individuals.

The proposal takes an incremental step towards tying payments to services delivered by making a modest change in the way LIP dollars are distributed for about 10 percent of the proposed LIP. This is a positive step, but we think more fundamental changes to the distribution approach are needed so that payments support services provided to beneficiaries and low-income individuals.

Principle: Provider payment rates must be sufficient to promote provider participation and access, and should support plans in managing and coordinating care.

The proposal shifts some funds to rate increases while adding new funds to the prior LIP methodology. Together, these changes mean that the LIP distributes funds in a way that does not align with providers' role in serving the Medicaid population and financing low-income uncompensated care. Additionally, no net LIP dollars would be shifted to rates. As we noted in our April letter, we are concerned that provider payment rates be sufficient to promote provider participation and access, and support plans in managing and coordinating care. These concerns are buttressed by the finding in the independent report that the state commissioned that during the time LIP has been in existence, provider payment rates have been cut by 25 percent, continuing a trend that started before LIP was created. We also note the December 2014 U.S. district court findings that identified Florida's Medicaid reimbursement rates as insufficient to ensure access for services provided to children in Florida. While the district court later determined that a private right of action to challenge Medicaid payment rates was not available in light of the Supreme Court's decision in Armstrong v. Exceptional Child, 135 S. Ct 1278 (2015), the findings raise questions as to whether or not Florida reimbursement rates comply with the requirements of section 1902(a)(30)(A) of the Social Security Act. CMS is concerned about these findings and would like to work with the state to better understand and address them as the state continues to strengthen its managed care delivery system.

Transitional LIP Funding in 2015-2016

This letter outlines an approach to the LIP over the next two years to help Florida maintain the stability of its providers while the state makes changes to its payment structures. Our preliminary view is that 2015-2016 should serve as a transition year, and that funding for the LIP during this fiscal year should revert to \$1 billion, the LIP funding level in 2013-2014, before completion of the state's transition to managed care. This effectively returns the LIP to its annual level from 2006-2013 and helps to create stability for providers, while the state creates alternative financing arrangements. During this transition year, the state may request changes to the distribution methodology for LIP funds to support our shared goal of maintaining stability of providers during this transition. This could include retaining current LIP distribution methodologies or distributing funds to LIP providers in proportion to the amounts those providers receive in the 2014-2015 LIP.

Additional Funding for Financing Health Care to Enhance Medicaid Revenues

In addition to having the federal funding for the LIP, Florida has a number of options under Medicaid state plan authority to increase payment rates and draw down associated federal matching dollar revenues in a manner that supports beneficiary access to care and pays Medicaid providers in ways that are consistent with the principles articulated in our April 14, 2015, letter. One option is for the state to broadly increase Medicaid rates, which would better support providers in delivering care to Medicaid beneficiaries by addressing any shortfall in payment rates. The state could elect to increase rates paid to managed care organizations and used to support hospitals, which would improve coordination of care, as noted in our April 14 letter.

The state could fund its share of the increased provider rates through continued use of intergovernmental transfers. Using existing state and local contributions (which are currently providing match inside of the LIP) over and above the funds that would be necessary for the state share of a \$1 billion 2015-2016 LIP, the state could use those same dollars to fund provider rate increases. With federal match, we believe this would generate approximately \$1.8 billion in funds for providers who serve Medicaid beneficiaries. Alternatively, or additionally, Florida could use state general revenue as the non-federal share to fund an increase in provider rates. We note that the Florida House of Representatives on April 24, 2015, proposed the use of state general funds to pay providers. With the federal match, the amount proposed by the House would total about \$1.5 billion in additional funds for providers.

The decision about whether or not to expand Medicaid is a state option, as we have noted previously. Regardless of whether a state expands, uncompensated care pool funding should not pay for costs that would be covered in a Medicaid expansion. Therefore, the state's expansion decision does not affect the size of the LIP itself. We believe that Medicaid expansion as evidenced by experience in other states would bring significant benefits to low income Floridians and the Florida health care system. Should the state elect this option, it would serve as an additional means for the state to support providers in delivering care to the low-income population. The Urban Institute has projected that coverage expansion would increase revenues for Florida hospitals by over \$2 billion.² This revenue, if added to LIP funding, either alone or in combination with the above options, could significantly increase provider revenues in the state. As we noted in our April 14 letter, the impact of Medicaid expansion on broadening coverage, reducing uncompensated care, and increasing economic activity would be substantial.

LIP Funding Starting in 2016-2017 for Ongoing Uncompensated Care in Florida

CMS has also made a preliminary estimate of a funding level for the LIP after the transitional year that would be consistent with the principles articulated in our April 14 letter. The LIP is authorized under a section 1115 demonstration, which is approved at CMS's discretion. In

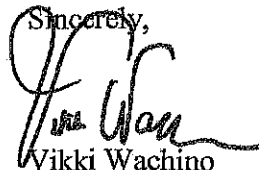
² Stan Dorn, Matthew Buettgens, John Holahan and Caitlin Carroll (March 2013) "The Financial Benefit to Hospitals from State Expansion of Medicaid: Timely Analysis of Immediate Health Policy Issues." Urban Institute. Available at <http://research.urban.org/uploadedpdf/412770-The-Financial-Benefit-to-Hospitals-from-State-Expansion-of-Medicaid.pdf>

CMS' view, authorizing funds through the LIP to support providers by covering the costs of uncompensated and charity care for low-income individuals who are uninsured and cannot be

covered through Medicaid or other insurance programs supports the objectives of the Medicaid program. However, we do not consider paying through an uncompensated care pool for costs that could be covered through Medicaid expansion or other coverage to promote the objectives of the Medicaid program. Consistent with these principles, our preliminary analysis indicates that the amount of hospital uncompensated care that would not be covered through Medicaid expansion or other coverage is approximately 25-28 percent of the current LIP, or about \$600 million per year. CMS has preliminarily concluded that it would be willing to provide demonstration authority to the state for an uncompensated care pool at this level for the remainder of Florida's current demonstration period which ends June 2017. The data and assumptions that we used to develop this estimate are identified in the attachment to this letter. We note that in 2016-2017, the state may also receive federal matching funds over and above the LIP amount by exercising the same options to increase provider funding through rates or expand coverage that we described above.

In addition, over the next year, CMS plans to work with the state to develop a distribution methodology for the LIP that distributes funds in a way that more closely aligns with providers' role in serving the Medicaid population and financing low-income uncompensated care. We also intend to work with the state to establish annual reporting to improve the transparency of the LIP program.

Thank you for your continued work with CMS to develop provider payments that best promote our shared goals of ensuring access and the quality of care to Florida Medicaid beneficiaries and support a strong safety net in Florida. If you have questions about this letter, please contact Eliot Fishman, Director, Children and Adults Health Programs Group, at 410-786-9535.

Sincerely,

Vikki Wachino
Director

Attachment

The estimated funding level for the LIP beyond state fiscal year 2015-2016 figure is based on charity care costs reported in the 2013 Healthcare Cost Report Information System (HCRIS) data, the most recent available federal hospital cost report data. This data source was used extensively in the independent report, "Hospital Funding and Payment Methodologies for Florida Medicaid" commissioned by the Florida Agency for Health Care Administration, and was suggested by the state as a data source for uncompensated care costs in Florida earlier this year. This estimate also reflects the exclusion of costs associated with the estimated difference between Medicaid payment and the cost to providers of providing these services. The estimate also excluded costs associated with pending receivables and costs associated with other payment issues for patients with insurance. The estimate also includes adjustments to 2013 charity care levels to reflect projections of reduced levels of uninsured from implementation of the Marketplace and Medicaid expansion, estimated at slightly over 50% by the Kaiser Family Foundation³

³ John Holahan, Matthew Buettgens, Caitlin Carroll, Stan Dorn, "The Cost and Coverage Implications of the ACA Medicaid Expansion: National and State-by-State Analysis" (November 2012). Available at <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/8384.pdf>



THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

JAN 23 2015

The Honorable Bill Haslam
Governor of Tennessee
Nashville, TN 37243

Dear Governor Haslam:

Thank you for our continued series of productive meetings on Tennessee's plans for Medicaid reform. Per our conversation, I wanted to provide you with the following information on the Medicaid coverage expansion provision of the Affordable Care Act.

As you know, the law provides that the federal government will pay 100 percent of the costs for such newly-eligible adult beneficiaries through 2016. The federal contribution gradually declines beginning in 2017, but is never less than 90 percent of the cost of care. In previous guidance, we notified states of the opportunity to extend coverage, and the absence of federal financial penalties if a state does not do so, or if it does so and later drops such coverage. See question and answer 25 of the *Frequently Asked Questions on Exchanges, Market Reforms and Medicaid*, issued on December 10, 2012, and available at:


<http://www.cms.gov/CCIIO/Resources/Files/Downloads/exchanges-faqs-12-10-2012.pdf>.


Consistent with that guidance, Tennessee may take up the Medicaid coverage expansion and later drop it at state option. There is no requirement for a state to maintain coverage for the new adult group. Further, if Tennessee expands Medicaid coverage and then drops such coverage at a later point, there would be no financial penalty and no reduction to the federal matching dollar rates otherwise available to Tennessee for its Medicaid program.

I hope this information is useful in your efforts to help low-income Tennessee residents gain coverage and to reduce uncompensated care for Tennessee health care providers. Please do not hesitate to contact me if you have any further thoughts or concerns.

Sincerely,


A handwritten signature in black ink that reads "Sylvia M. Burwell".
Sylvia M. Burwell


U.S. Department of Health & Human Services


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Medicaid Expansion

The Affordable Care Act gives states new opportunities to expand Medicaid. Individuals under 65 years of age with incomes up to 133% of the federal poverty level may be eligible for Medicaid in states that have elected to expand their Medicaid programs. Certain low-income adults without children in those states will be eligible for Medicaid coverage for the first time without need for a waiver.

Key issues for family planning providers in Medicaid expansion states include screening for [eligibility](#) and enrollment of newly Medicaid-eligible individuals. Under the Affordable Care Act, states must use a [single, streamlined application](#) to apply for coverage through programs including Medicaid and CHIP as well as the Marketplace (described below). Individuals must be able to apply in person, online, by phone or by mail. The law further requires states to use new uniform eligibility standards based on the applicant's [modified adjusted gross income \(MAGI\)](#) to calculate eligibility. These same standards will be used to calculate eligibility for premium tax credits and cost-sharing reduction available through the [Marketplaces](#).

Medicaid and Children's Health Insurance Program (CHIP) eligibility and enrollment are much simpler and are coordinated with the newly created [Health Insurance Marketplaces](#).

In states that are not implementing the Medicaid expansion in 2014, some people won't qualify for either Medicaid or lower Marketplace Insurance costs. [Read more about states not expanding Medicaid here](#). States may choose to expand Medicaid in the future.

Read more about [Medicaid and CHIP eligibility and enrollment](#).

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U.S. Department of Health & Human Services - 200 Independence Avenue, S.W. - Washington, D.C. 20201



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

Governor's Office > Press Room > Full Press Release

GOVERNOR WALKER INTRODUCES MEDICAID BILL



[Track Senate Bill 78](#)

[Track House Bill 148](#)



[Download the fiscal note narrative](#)

March 17, 2015 JUNEAU– Governor Bill Walker today transmitted legislation to provide health care coverage to up to 42,000 low-income Alaskans, reform Medicaid, and bring more money into the state.

"As Alaskans, we have a long tradition of caring for each other when times are tough," Governor Walker said. "This proposal will save money and save lives. It provides health care for more Alaskans using less state money. It's the right thing to do."

The bill

<http://gov.alaska.gov/Walker/press-room/full-press-release.html?pr=7098>

EXHIBIT 5
Page 1 of 3

1/3

(1) Takes advantage of available federal resources by accepting an estimated \$146 million in federal Medicaid expansion money; and

(2) Lays out the governor's plans to reform the state's Medicaid system to ensure the program is affordable over the long term.

The bill makes health coverage available through Medicaid to Alaskans who earn about \$20,314 or less (\$9.76 per hour) or married couples who earn \$27,490 or less.

"Governor Walker and I have heard from so many Alaskans about their inability to get the health care they need," Health and Social Services Commissioner Valerie Davidson said. "We all have an interest in ensuring that Alaskans are as productive as possible and can contribute to our communities and economy. But people can't work, hunt, or fish when they are not healthy."

Through 2016, the federal government will pay 100 percent of the costs for newly covered Alaskans. After that, the federal match transitions to 90 percent in 2020 and beyond. The savings to the state will more than cover our match.

Access to health care means improved health outcomes and increased productivity and independence. More Alaskans will get preventive and primary care, including behavioral health services and help in managing costly chronic diseases.

Business owners will benefit because of reduced turnover and fewer lost work days due to employees with unattended illnesses and injuries. Reductions in uncompensated care will help keep a lid on insurance premiums.

Dozens of Alaska organizations and local governments, and thousands of individual Alaskans have expressed support for federally funded Medicaid expansion coupled with smart reforms.

An estimated 42,000 Alaskans will become eligible for Medicaid under the bill, and 20,000 Alaskans are expected to sign up the first year, according to Evergreen Economics, the state's longtime Medicaid consultant.

The bill is expected to bring \$146 million in new federal money to Alaska in FY 16, the equivalent of about 10 percent of the state's FY 16 capital budget. The money is expected to generate an estimated 4,000 jobs and \$1.2 billion in wages and salaries. It will reduce the state's FY 16 general fund budget by \$6.5 million.

"We pay for health care one way or another," Governor Walker said. "Alaskans pay into the federal treasury and this is a practical way to build our health infrastructure using federal money."

The governor's bill makes Alaska's participation contingent on the state's match not exceeding 10 percent. Governor Walker received a letter from U.S. Secretary of Health and Human Services Sylvia Burwell confirming that Alaska can opt out with no penalties if the state match goes above the 10 percent written into federal law.

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Press Secretary

katie.marquette@alaska.gov

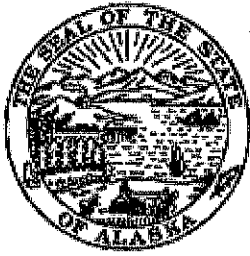
Aileen Cole

Deputy Press Secretary

aileen.cole@alaska.gov



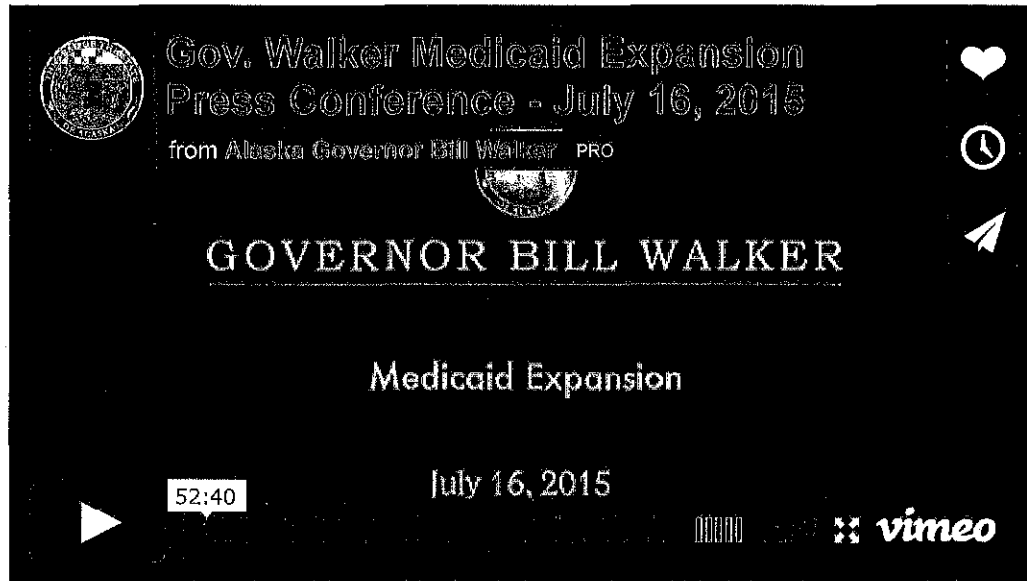
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THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

Governor's Office > Press Room > Full Press Release

NEXT STEPS ON MEDICAID EXPANSION ANNOUNCED



July 16, 2015 ANCHORAGE—Governor Bill Walker sent a letter to the Legislative Budget and Audit Committee today, giving members the required 45-day notice of his intention to accept additional federal and Mental Health Trust Fund Authority money to expand Medicaid in Alaska.

Governors and legislatures in 29 states plus the District of Columbia have already made the decision to accept Medicaid expansion. Ten Republican governors have approved Medicaid expansion. Republican legislatures in five states have approved Medicaid expansion.

Governor Walker first included Medicaid expansion funds in his fiscal year 2016 operating budget, and later submitted his own Medicaid reform and expansion bill after the legislature removed the funding in his budget. Expanding Medicaid would bring \$146 million to the state in its first year and provide health care to more than 20,000 working Alaskans.

Governor Walker's Medicaid expansion bill was not taken to the floor for a vote during the regular legislative and two special sessions. Now, the Governor has provided notice to the Legislative Budget and Audit Committee, which has the authority to review requests to accept receipt of non-general fund money when the Legislature is not in session.

"Thousands of Alaskans and more than 150 organizations, including chambers of commerce, local hospitals, and local governments, have been waiting long enough for Medicaid expansion," Governor Walker said. "It's

time to expand Medicaid so thousands of our friends, coworkers, neighbors, and family members don't have to make the choice between health care or bankruptcy."

Medicaid expansion would reduce state spending by \$6.6 million in the first year, and save over \$100 million in state general funds in the first six years.

"Every day that we fail to act, Alaska loses out on \$400,000," Governor Walker said. "With a nearly \$3 billion budget deficit, it would be foolish for us to pass up that kind of boost to Alaska's economy."

Department of Health and Social Services Commissioner Valerie Davidson echoed the Governor's sentiments, stressing the broad benefits of Medicaid expansion.

"This is about taking care of Alaskans," said Commissioner Davidson. "Expanding Medicaid will save lives, improve the economy, save the state money, and serve as a catalyst for reform. The department is ready to make this happen and do what it takes to help Alaskans access health care."

In response to Governor Walker's request, the LB&A committee can do one of three things within the next 45 days: recommend that the state accept the federal and Mental Health Trust Fund Authority money as outlined in the Governor's letter; recommend the state not accept that money; or provide no response. Additionally, during the 45-day period, the legislature could call itself into a special session to address Medicaid expansion.

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Press Secretary

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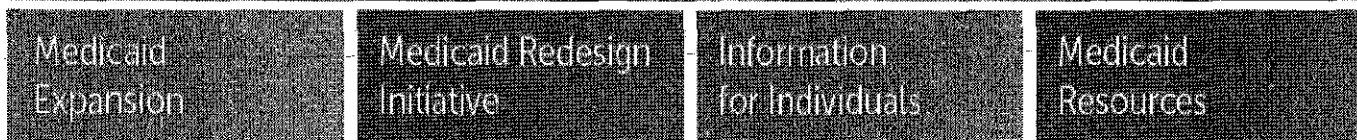
Aileen Cole

Deputy Press Secretary

aileen.cole@alaska.gov



Click **[here](#)** to subscribe to Governor Walker's press releases list.



Health care coverage saves lives and helps people stay productive, but many Alaskans have been unable to get the health care they need. The Healthy Alaska Plan presents the path toward affordable, sustainable health care for low-income Alaskans through Medicaid expansion and reform. Read the Healthy Alaska Plan: A Catalyst for Reform report.

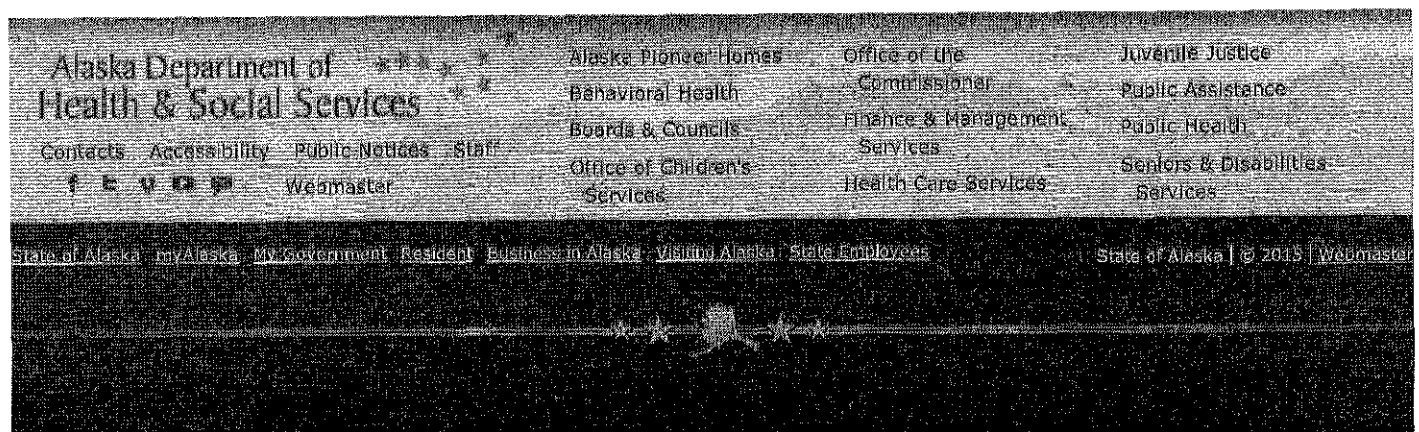
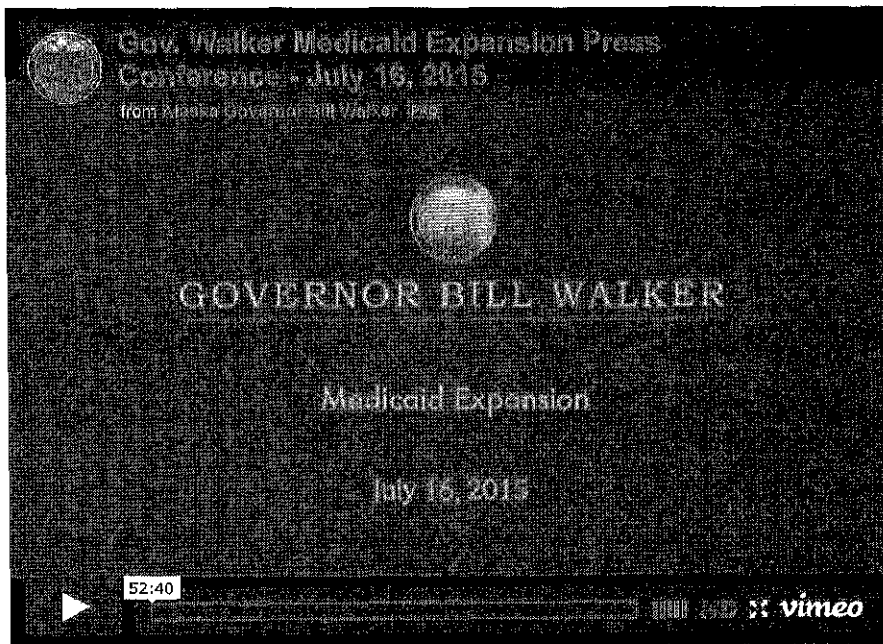
Medicaid expansion will help Alaskans stay healthy while building the health of Alaska's economy through jobs, federal revenues and savings to the state's general fund. It will further leverage the Medicaid reforms already underway in Alaska into ongoing savings. Everyone has an interest in ensuring that Alaskans are as productive as possible and can contribute to their communities and economy. People can't work when they are not healthy. They cannot hunt. They cannot fish. Making sure Alaskans can access medical care is the right thing to do.

NEWS

› [Frequently Asked Questions on Medicaid Expansion in Alaska \(PDF\)](#)

- › **Medicaid Expansion Sign-Up Flyer (PDF)**
- › **Governor Walker announces intent to expand Medicaid effective September 1:** Governor Walker sent a letter to the Legislative Budget and Audit Committee July 16, giving members the required 45-day notice of his intention to accept additional federal and Mental Health Trust Fund Authority money to expand Medicaid in Alaska. Read the:
 - › Governor's press release
 - › DHSS press release
 - › Frequently Asked Questions about Medicaid Expansion
- › **July 27 Medicaid Redesign Initiative webinar recording, PowerPoint, and Q&A list now available**
- › **Draft Medicaid State Plan Amendment (SPA) released for public comment:** On July 21 the department released the draft Medicaid State Plan Amendment for the Alternative Benefit Package for the Medicaid expansion population for public comment. For more information please visit the public notice web page at: <https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=177632>
- › **Request for Proposals (RFP) for technical assistance with implementation of Home and Community-Based Service Medicaid options 1915(i) and 1915(k) released:** The department released the RFP on July 14, and proposals are due August 8. See the public notice for more information and to access the RFP at: <https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=177572>

› •







THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

Department of Law

Office of the Attorney General
1031 West 4th Avenue, Suite 200
Anchorage, Alaska 99501-5903
Main: 907-269-5100
Fax: 907-269-5110

July 31, 2015

VIA EMAIL TO senator.john.coghill@akleg.gov & 1ST CLASS MAIL

The Honorable John Coghill
Alaska State Legislature
1292 Saddler Way, Ste. 240
Fairbanks, Alaska 99701

Re: Legal Grounds for Medicaid Expansion

Dear Senator Coghill:

After reading your op-ed "Walker must explain why unilateral Medicaid expansion does not violate federal law," I wanted to provide the Department of Law's position on the legal issues you raise. Ultimately, the Department of Law concluded, as did Legislative Legal Counsel in November 2014, that Alaska's current Medicaid statutes encompass expanding Medicaid services to people whose income falls below 138% of the federal poverty level.¹

As you correctly state in your op-ed, the analysis comes down to the question of whether expansion covers individuals who are "required" to receive Medicaid services versus individuals or services that are "optional."² You assert that because the U.S. Supreme Court decision in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) determined that states could not be penalized for not accepting Medicaid expansion, this turns expansion into an "optional" Medicaid service under state law, instead of a required one. However, this does not impact whether Medicaid expansion counts as "required," and therefore already authorized, for purposes of Alaska's state statute. The Department of Law came to this conclusion based on the construction of the state statute, federal law, and the U.S. Supreme Court decision.

As you pointed out, Alaska's Medicaid program automatically covers all categories of people and services that are "required" under federal law.³ By contrast, "optional" categories of people and services are specifically enumerated in Alaska statutes.⁴

¹ The Affordable Care Act specifically states that it covers people whose incomes falls below 133% of the federal poverty level, but because of the way this is calculated, it is effectively 138%. 42 U.S.C. 1396a(a)(10)(A)(i)(VIII).

² See AS 47.07.020(a).

³ AS 47.07.020(a), 47.07.030(a).

The Affordable Care Act (ACA) amended the federal Medicaid statutes to make all people whose income falls below 133% (effectively 138%) of the federal poverty line a “required” category of beneficiaries.⁵ Under normal statutory construction, because the federal law has included the group of “expansion” beneficiaries as a “required” category, these people are already covered under Alaska Medicaid by operation of AS 47.07.020(a). The question becomes what impact the U.S. Supreme Court decision had on the statutory construction.

It is true states are not required *in practice* to cover this expanded group of beneficiaries because of the U.S. Supreme Court’s decision in *National Federation of Independent Business v. Sebelius*.⁶ The specific challenge in that case was to the ACA’s mechanism to enforce the Medicaid expansion: a section providing any state that failed to expand Medicaid to the extent required by the ACA could lose some or all of its funding for existing Medicaid programs.⁷ The Court ruled it was unconstitutional for the federal government to apply this penalty—denial of all federal Medicaid funds—to states that did not expand Medicaid as provided in the ACA.⁸ The Court did not strike down the new required category, but instead, struck down the penalty for not complying with it.

Just because there is no enforcement mechanism does not change the language of federal law or the language of state law. Because Alaska statutes authorize Medicaid coverage for all people who fall under the “required” category in federal law, Alaska statutes already authorize coverage for this new group of potential Medicaid beneficiaries. It is possible that the Alaska statute could have been amended to specifically prohibit expansion following the *Sebelius* decision, but it was not. Under current federal and state law, those benefitting from expansion are included under the “required” category.

This is why when Governor Walker submitted his budget in February he included appropriations for expansion and did not seek to submit a bill amending the statute. The advice from my office was that no substantive statutory change was necessary. It was only after being requested by the legislature to submit a bill to have Medicaid expansion considered that

⁴ See AS 47.07.020(b) (authorizing coverage of optional categories of beneficiaries, such as pregnant women whose income is less than 175% of the federal poverty line); AS 47.07.030(b) (authorizing coverage of optional Medicaid services such as home and community-based services, prescription drug coverage, and adult dental services).

⁵ 42 U.S.C. 1396a(a)(10)(A)(i)(VIII).

⁶ 132 S. Ct. 2566 (2012).

⁷ 42 U.S.C. § 1396c.

⁸ *NFIB v. Sebelius*, 132 S. Ct. at 2607-09.

Sen. John Coghill
Re: Legal Grounds for Medicaid Expansion

July 31, 2015
Page 3 of 3

Governor Walker introduced HB 148. This was done out of respect for the legislature's wishes and not as an indication that the administration believed a statutory change was needed.

I hope the above clarifies the legal position of the Department of Law and the administration on this issue. I have also attached the opinion from Legislative Legal Counsel from November 2014 for your reference. For your information, we have already received a media request for our position on this matter, and we will be providing a copy of a prior letter sent to Rep. Hawker on the same subject along with the opinion attached.

Sincerely,



Craig W. Richards
Attorney General

cc: Cori Mills, Legislative Liaison, Department of Law
Darwin Peterson, Legislative Director, Office of the Governor

AFFIDAVIT OF CHARLES MICHAEL "MIKE" CHENAULT

STATE OF ALASKA)
)
THIRD JUDICIAL DISTRICT) ss.

CHARLES MICHAEL "MIKE" CHENAULT, being first duly sworn upon oath,
deposes and states:

1. I make the following affidavit based on personal knowledge.
2. I am a member of the Alaska State House of Representatives representing District 29, which encompasses several communities on the Kenai Peninsula.
3. I have served in the Alaska State House continuously since first being elected in 2000.
4. Since 2009, I have served as a member of House Leadership as the Speaker of the House.
5. I am familiar with the state's budget and the budgetary processes of the state, and served on the House Finance Committee and as Co-Chair of the House Finance Committee 2005-2008.
6. Alaska's existing Medicaid program costs the state more than \$600 million each year and, even without expansion, Medicaid is the one of the fastest growing components of our state budget. Total state and federal spending on the existing Medicaid program is more than \$1.6 Billion.
7. With an unprecedented decline in state revenues this year, Alaska faces a serious and uncertain fiscal future. Already this year the legislature has been forced to eliminate state jobs, significantly reduce the operating and capital budgets and prioritize expenditures. With an FY 16 budget deficit of approximately \$4 Billion, and next year's FY 17 deficit projected to be also around \$4 Billion or more, the Alaska Legislature is struggling mightily to identify ways to reduce the size and cost of government. We have only just started that process and many more cuts will be needed in order to help balance our state budget. There is simply not enough money to fund the level of government we already have.
8. Every budget decision to commit state funds to one program has a consequence for all other programs. With limited funds available, every additional state dollar spent on Medicaid expansion will mean fewer state dollars available for education, public safety and other vital state needs.

9. The decision by Governor Walker to unilaterally expand Medicaid coverage to a new group of tens of thousands of beneficiaries will only make Alaska's budget problems worse. While the federal government will initially pay most of the projected cost of expansion, Alaska's share of administrative costs this year alone is expected to be several million dollars. Additionally, the federal government has announced it will begin reducing reimbursements percentages incrementally over the next several years, with states being on the hook to pay a larger share of the program's cost in the future. Undeniably, that cost to Alaska will be in the tens of millions of dollars each year – and likely much more if recent Alaska Medicaid program growth and cost is any indicator.
10. As Speaker, I am also familiar with the constitutional responsibilities and working relationships between local and state governmental bodies and the constitutional responsibilities and working relationships between the state legislative and the executive branches.
11. The legislature alone can appropriate funds for state government.
12. Article 2, Section 1 of the Alaska Constitution clearly and unequivocally vests all legislative power solely with the Alaska Legislature. No other branch of state government is authorized lawmaking power under the Alaska Constitution.
13. Article 9, Section 13 of the Alaska Constitution states: "No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law."
14. Alaska law is also very specific with regard to expansion of Medicaid. AS 47.07.020(d) states: "[a]dditional groups may not be added unless approved by the legislature."
15. The decision by Governor Walker to unilaterally expand Medicaid coverage to a large new group of beneficiaries who are not currently covered by the Medicaid program violates both the letter of Alaska law and the Alaska Constitution because it disregards AS 47.07.020(d) and the separation of powers and power of appropriation reserved solely for the legislature.
16. Without legislative approval, the decision by Governor Walker will financially encumber future legislatures and violate our state constitution. It also risks bankrupting Alaska in the future should federal reimbursements be reduced even further.

17. If the governor's unconstitutional action is not enjoined, irreparable harm will occur to the constitutional structure of our state government, with serious and irreversible consequences to our current and future budgets.
18. Without a doubt some of those most at risk of irreparable harm from this unconstitutional action are the very people Medicaid is intended to protect. Current Medicaid beneficiaries, such as single women and children, or the elderly, may find themselves squeezed completely out of the health care market given the shortage of doctors in Alaska willing to accept Medicaid or Medicare patients currently. The risk they will not be able to find doctors will be amplified by the lower federal reimbursement rates health care providers receive for current Medicaid or Medicare patients compared to the much higher reimbursement rate the federal government is offering for the expanded Medicaid population.
19. Moreover, if the governor's unilateral, unconstitutional action is not enjoined, irreparable harm might be inflicted upon the very people he is seeking to protect. If expansion is allowed to proceed while the legislative legal challenge is pending, there is an absolute certainty that those who enroll will suffer irreparable harm if a court later finds in favor of the legislature. Tens of thousands of Alaskans will have forgone other health care options they currently have, or might have sought, under the belief they would be covered by Medicaid expansion only to suddenly find themselves without any health care coverage at all. Those Alaskans will have relied on an unconstitutional offer to their detriment. Therefore, unless it is absolutely clear that the governor has the unilateral authority to expand Medicaid to thousands of new beneficiaries, it is incumbent on this court to protect those Alaskans and all Alaskans by enjoining the governor's potentially unconstitutional, unilateral action.

DATED this ____ day of August, 2015.

CHARLES MICHAEL "MIKE" CHENAULT

SUBSCRIBED AND SWORN to before me this ____ day of August, 2015.

Notary Public in and for Alaska
My Commission Expires: _____

AFFIDAVIT OF PETE KELLY

STATE OF ALASKA)
)
FOURTH JUDICIAL DISTRICT) ss.

PETE KELLY, being first duly sworn upon oath, deposes and states:

1. I am over the age of eighteen years, have personal knowledge of the facts contained herein and am a resident of the Fourth Judicial District.

2. I am a State Senator representing District A. I have been the Co-Chairman of the Senate Finance Committee overseeing the Operating Budget since January 2013. I previously served in the State Senate from 1999 to 2002 and the House of Representatives from 1995 to 1998. I served as Senate Finance Co-Chair overseeing the Capital Budget in 2001-2002. I served on the Senate Finance Committee 1999-2002 and the House Finance Committee 1995-1998. All combined this is a total of 11 years serving on the Legislature's Finance Committees and 5 years as the co-chairman.

3. It is my sincere belief that Alaska will suffer irreparable harm if Governor Walker unilaterally expands Medicaid eligibility to a new group of able-bodied, working age, childless adults up to 138% of the federal poverty line.

4. While the federal government may provide 100% reimbursement of the cost of the medical benefits provided to the new class of recipients, the state will

still have to pay the administrative costs at 50%. Those are estimated to be in excess of \$1,500,000 dollars for this budget cycle and are a recurring and continuing cost so that they will become an obligation of the state for as long as this class of recipients is eligible. The administrative costs of supporting an expanded Medicaid program results in 23 new full-time positions (FTEs) with the associated salary and benefit costs.

5. In addition current federal law provides that the 100% match will end in Fiscal Year 2017 and the state will have to pay a portion of the cost. The enhanced Federal Medical Assistance Percentage (FMAP) rates only apply to the actual Medicaid services and not the administrative costs of this new class of recipients. The administrative costs are always a 50% FMAP. Again this is a recurring cost and will continue into the future.
6. The suggestion has been made that the Alaska Medicaid program could exclude this class of new recipients when the 100% federal match goes away. However, there would be significant costs to terminate the eligibility of this class of recipients due to transition requirements enacted by Health and Human Services Secretary Sylvia Burwell. Secretary Burwell outlined this in a letter to Governor Walker dated March 6, 2015. In my experience, once the legislature adds a new benefit class in any public assistance or entitlement program, they are seen as formula programs with required spending. These formula programs become protected and virtually impossible to undo.

7. During the 2015 regular and two special legislative sessions, the House and Senate Finance Committees made significant changes and reductions to the budget package Governor Walker proposed. Because of the significant decline in the price of oil, the state was projected to have significantly less income and very hard decisions had to be made about what state programs were able to spend. The Fiscal Year 15 budget deficit was \$3.726 billion dollars. In order to balance the deficit the Legislature chose to exhaust the remaining \$2.8 billion dollars in the Statutory Budget Reserve fund, as well as, exhaust nearly \$1.0 billion in the Public Education Fund. This unfathomable deficit resulted in entirely cutting or curtailing worthwhile state funded programs and the inability to forward fund public education. Public education remains a constitutional requirement to fund.

The Finance Committees started the session with a projected \$4 billion deficit outlook for Fiscal Year 2016. The legislature cut nearly \$500 million from the capital budget, and nearly \$300 million in day to day government operations. This was an overall budget cut of around 10%. Governor Walker also vetoed \$200 million in oil and tax credits. These credits remain a fiscal obligation of the state and now must be paid in future budgets. After the spending cuts by the legislature and the veto by the Governor, FY 16 still has a projected deficit of \$2.974 billion. If oil remains at current prices, the Constitutional Budget Reserve can only fill these gaps for two, maybe three years. Increasing the administrative and program costs of the

Medicaid program puts even more pressure on the state budget and risks the ability of the state to fund other worthwhile programs, like constitutionally required programs.

8. I understand that the Governor proposes to use funds from the Mental Health Trust Authority earnings account to pay for the administrative cost of the first year of expanding the program. The purpose of the MHTA Trust fund is to provide funding for a comprehensive statewide mental health treatment system. Many beneficiaries of that statewide mental health system are currently eligible for state assistance from other sources including grant funding available to fund a full range of mental health services in the State of Alaska. There will be only incidental benefit to the current beneficiaries of the mental health system from expanding Medicaid. However, the mental health system in the state will lose the benefits that could be provided with the funds that are proposed to be diverted to help the new class of Medicaid participants, most of whom do not need treatment for mental health issues. As a result of the state budget problems, the general fund will likely not be available to supplement funding for the mental health system. In short, funds which are supposed to be used to fund mental health care are being diverted to other health needs. The services lost are irreplaceable. This puts the State at an extremely vulnerable position due to the history of lawsuits around the State's obligation to fund mental health services. The legislature may be in a position of funding the Medicaid

services for the expansion population or face another lawsuit for not funding mental health services.

9. Beyond the implications on the state budget, other irreparable harm would likely result from expanding the Medicaid program to include working age, able-bodied, childless persons earning less than 138% of the federal poverty wage. It puts more demand on the Medicaid program. There are press reports concerning the computer problems experienced in both the payment and eligibility systems. Those problems have resulted in delayed payments and other associated disruptions. There have been small Alaska providers that had their businesses put in jeopardy due to lack of payment on Medicaid billings. According to the February 2, 2015 affidavit of Margaret Brodie, DHSS paid \$164, 633,356.00 in advance payments to providers as a result of the payment system problems; DHSS has only been able to recover \$60,476,117 of those payments. The outstanding balance that may never be recovered is \$104 million. The payment system has not received certification by the Centers for Medicare and Medicaid (CMS) at this time. Adding thousands more to the program will compound these problems as well as jeopardize the current Medicaid providers from being able to serve Medicaid recipients if they cannot get paid.
10. Alaska suffers from a shortage of physicians and adding thousands more to the Medicaid rolls will exacerbate the problem and make it likely that current Medicaid recipients will experience delays in obtaining medical care

when they need it. These delays will affect all Alaskans seeking health care, whether Medicaid recipients or not. In addition, Medicare patients will be adversely effected as well.

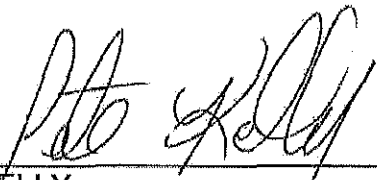
11. I am not a lawyer, but I understand that unless federal law requires a class of persons to be eligible, addition of new groups of eligible persons requires the legislature to act. As an Alaskan I think it is important that expansion of the Medicaid system be done as the law requires and not unilaterally.
12. I think there is also particular harm which would result if the program were expanded for a short period of time and then reduced when full federal funding stops. That would confuse recipients who are made eligible and then quickly lose their eligibility. No long term health benefits will occur and in individual cases harm could result as helpful medical care suddenly is no longer available. Necessary drug therapies could end, post-surgical care would end, and health maintenance programs would stop. In my opinion it would be the worst of all options to expand the program unilaterally and then suddenly stop it.
13. The legislature reserves the power to expand such optional groups. Furthermore, the legislature never acted to add an additional optional group.
14. Legislative review and approval of an additional, eligible Medicaid group is necessary to understand the financial repercussions for the state. Governor Walker's Medicaid expansion bills – SB 78 and HB 148 – are awaiting full

review by both Finance Committees at the start of the next legislative session. These Committees are charged with thoroughly vetting any financial commitment the State will take on. The legislature has been given dueling DHSS commissioned reports by the Lewin Group and Evergreen Economics about the number of Medicaid expansion enrollees. The Lewin Group estimated around 40,284 enrollees in the first year, while Evergreen Economics estimated 26,535 enrollees in the first year. Such a large disparity makes it difficult to know the full financial implications to the State. If the legislature assumes the lower projections are correct, but numbers surge to the 40,000 range, there may not be the general fund dollars to pay the federal match required starting in Fiscal Year 2017.

15. Importantly, legislative review and approval is necessary to understand the effect on existing health care providers in Alaska. Putting more pressure on an already burdened system will certainly decrease services for existing Medicaid eligible groups. This will create irreparable harm to both the providers and the existing groups.
16. Legislative review and approval is necessary to determine the sustainability of such a program. In the fiscal reality of multibillion dollar deficits, the legislature will struggle to provide funding for Medicaid at its current level. The Centers for Medicare and Medicaid Services (CMS) must approve any request to drop coverage of the expanded population; this means the State

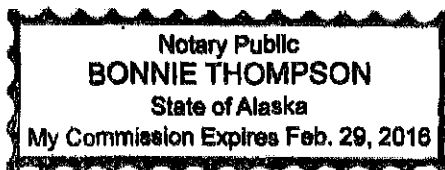
cannot unilaterally discontinue services. This effectively ties the hands of the Legislature to quickly respond to a worsening fiscal crisis, and highlights that expansion cannot easily be undone once it is enacted.

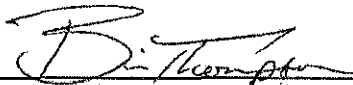
DATED this 24 day of August, 2015.



PETE KELLY

SUBSCRIBED AND SWORN to before me this 24th day of August, 2015.





Notary Public in and for Alaska
My Commission Expires: 02/29/2016

AFFIDAVIT OF WILLIAM J. STREUR

STATE OF ALASKA)
)
THIRD JUDICIAL DISTRICT) ss.

WILLIAM J. STREUR, being first duly sworn upon oath, deposes and states:

1. I am over the age of eighteen years, have personal knowledge of the facts contained herein, and am a resident of the Third Judicial District.
2. I am the former commissioner of the Alaska Department of Health and Social Services ("DHSS") under Governor Sean Parnell.
3. I served as Deputy Commissioner for Medicaid and Health Care Policy from April 2007 to December 2010, then acting commissioner from December 2010 until my appointment to commissioner in February 2011. I served until December 2014 when Governor Parnell left office.
4. I am very familiar with all aspects of DHSS, including the vision, mission, service philosophy, and financial issues.
5. It is my sincere belief that Alaska, and specifically DHSS and those they serve, will suffer irreparable harm if Governor Walker unilaterally expands Medicaid eligibility to a new group of largely able-bodied, working age, childless adults up to 138% of the federal poverty line.
6. While the federal government may provide 100% reimbursement of the cost of the medical benefits provided to the new class of recipients, the state will still have to pay up to half of the administrative costs. Those are estimated to be well in excess of \$1,500,000 dollars for this budget cycle and are a

recurring and continuing cost so that they will become an obligation of the state for as long as this class of recipients is eligible.

7. In addition, current federal law provides that the 100% match will end in 2017, and the state will have to pay a portion of the cost. Again, this is a recurring cost and will continue into the future, adding to the already significant costs of Medicaid in Alaska, arguably the highest in the nation.
8. I understand that the suggestion has been made that the Alaska Medicaid program could exclude this class of new recipients when the 100% federal match goes away. There would be significant costs to terminate eligibility for this class of recipients.
9. During 2014, I prepared the budget Governor Parnell was required by law to propose. Because of the significant decline in the price of oil, the state was projected to have significantly less income and so very hard decisions had to be made about what state programs were able to spend. Some very worthwhile programs were cut because of the projected decline in state funding. Increasing the administrative and program costs of the Medicaid program puts even more pressure on the state budget and risks the ability of the state to fund other worthwhile programs.
10. I understand that the Governor proposes to use funds from the Mental Health Trust Authority earnings account to pay for the administrative cost of the first year of expanding the program. The purpose of the MHTA Trust fund is to provide funding for a comprehensive statewide mental health treatment system. Many beneficiaries of that statewide mental health

system are currently eligible for significant state assistance from other sources. There will be only incidental benefit to the current beneficiaries of the mental health system from expanding Medicaid. Yet the mental health system in the state will lose benefits that could be provided with the funds that are proposed to be diverted to help the new class of Medicaid participants most of whom do not need treatment for mental health issues. And because of the state budget problems the general fund will likely not be available to supplement funding for the mental health system. In short, funds which are supposed to be used to fund mental health care are potentially being diverted to other health needs. The services lost are irreplaceable.

11. Beyond the implications on the state budget, other irreparable harm would likely result from expanding the Medicaid program to include working age, able-bodied, childless persons earning less than 138% of the federal poverty wage. It puts more demand on the Medicaid program. There have been press reports concerning the electronic claims processing and reporting system challenges that program has experienced. Those challenges have resulted in delays in payments, overpayments, confusion about eligibility and the like. In spite of our best efforts, we were unable to resolve those problems prior to leaving office. Adding 30% or more persons to the program will likely compound these problems.
12. In addition, historically many private physicians have been reluctant to accept Medicare and Tricare (our aged and current and former military

needy citizens) patients. Alaska suffers from a shortage of physicians anyway and adding thousands more eligible persons to the Medicaid rolls will again exacerbate the problems and make it likely that current Medicare and Tricare recipients will experience delays or outright denial to obtain medical care when they most need it.

13. I am not a lawyer, but I believe, from my experience at DHSS, that unless federal law requires a class of persons to be eligible, addition of new groups of eligible persons requires the legislature to act. As an Alaskan I think it is important that expansion of the Medicaid system be done as the law requires and not unilaterally.
14. I further believe there is also particular harm which would result if the program were expanded for a short period of time and then reduced when full federal funding stops. That will confuse recipients who are made eligible and then quickly lose their eligibility. No long-term health benefits will occur, and in individual cases harm could result as helpful medical care suddenly is no longer available, while previous avenues of care have been eliminated to support the expansion. Necessary drug therapies could end, post-surgical care would end, health maintenance programs would stop. Recipients and providers would be confused. There are real harms that will result and, in my opinion, it would be the worst of all options to expand the program unilaterally and then rapidly and suddenly stop it.
15. During my tenure, the State of Alaska did not expand Medicaid, as the legislature reserves the power to expand to such optional groups, and the

legislature never acted to expand the same. It is appropriate for the legislature to balance the advantages and disadvantages of expansion.

16. Legislative review and approval of an additional, eligible Medicaid group is necessary to understand the financial repercussions for the state.
17. Importantly, legislative review and approval is necessary to understand the effect on existing health care providers in Alaska. Putting more pressure on an already burdened system will certainly decrease services for all existing state and federally funded eligible groups. That constitutes irreparable harm to both the providers and the existing groups.
18. Legislative review and approval is also necessary to understand the effect on current Medicaid beneficiaries in Alaska. Expanding Medicaid to this additional optional group shall further divide a finite resource.
19. Legislative review and approval is necessary to determine the sustainability of such a program, because it is against the public interest to eliminate a program after Federal funding ceases at 100%, as the Governor has suggested he may do.
20. Legislative review and approval is necessary to review and understand the expanded administrative and enforcement costs that will come as a result of expanding benefits to this optional category.

DATED this _____ day of August, 2015.

WILLIAM J. STREUR

SUBSCRIBED AND SWORN to before me this _____ day of August, 2015.

Notary Public in and for Alaska
My Commission Expires: _____

AFFIDAVIT

STATE OF ALASKA)

THIRD JUDICIAL DISTRICT)

ss.

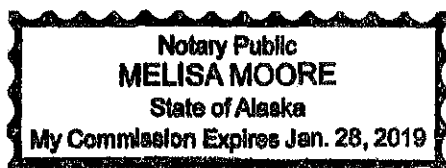
Linda Giani, being first duly sworn upon oath, deposes and states:

1. I am over the age of eighteen years and am a resident of the Third Judicial District.
2. I am the parent of a child with very severe disabilities and the Legal Guardian for two Alaska Native women, both of whom also experience very severe disabilities. I am also a Care Coordinator, certified by the State of Alaska as a Medicaid service provider of care coordination services.
3. Within the current Medicaid system, it has become increasingly more difficult for my son (who is extremely medically fragile, and physically and mentally impaired and who is on a very limited income) to get the medical equipment and prescriptions medications that he requires for his health and safety and very survival. Many of his required daily medications have been removed from the Medicaid formulary, required medical equipment is routinely denied, and each year, he is required to re-apply for Medicaid Waiver Services with no assurance that he will continue to receive these services due to budgetary cuts. Without Waiver Services, medical equipment, and numerous medications, he would require institutionalization (not available in Alaska) and would likely die. Looking at Alaska's present financial difficulties and pending cuts in services, it is irresponsible, and would irreparably harm my son, if Medicaid is expanded into an already unsustainable system with multiple unsolved problems (including Medicaid fraud and abuse of services).
4. I am also guardian for a severely disabled, medically fragile, Alaska Native young lady with a Medicaid Waiver who is unable to receive the in-home support services she desperately requires. Although changes to the system that would provide these services are practical, doable, and cost effective, the State of Alaska has not taken action to solve this issue. This is one example of issues that need to be addressed before expanding the system and introducing more Alaskans into an already dysfunctional system. This young lady is currently being irreparably harmed.

DATED this 23 day of August, 2015.

Linda Giani
Name

SUBSCRIBED AND SWORN to before me this 23rd day of August, 2015.



Melise Moore
Notary Public in and for Alaska
My Commission Expires: Jan 28, 2019

EXHIBIT 12

AFFIDAVIT OF BERTHA M. JARVI

STATE OF ALASKA)
)
FOURTH JUDICIAL DISTRICT) ss.

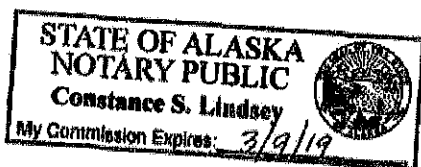
BERTHA JARVI, being first duly sworn upon oath, deposes and states:

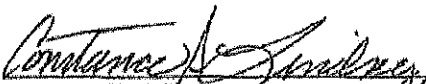
1. I make the following affidavit based on personal knowledge.
2. I am over eighteen years of age and I am a resident of the Fourth Judicial District.
3. I am a public guardian who represents vulnerable adults on Medicaid.
4. The existing Medicaid payment system is overloaded, the staff is over worked and the lag time for payment to my clients' service providers is putting those service providers in a position of having to borrow money to make their payroll and keep their businesses open.
5. I have submitted the same documents to Health & Social Services up to four times in some cases before getting payment approval and in one case almost cost one of my clients his job because he could not get assistance from his job coach.
6. I believe that if the governor is allowed to unilaterally expand Medicaid, it will place a further burden on an already broken system and will cause irreparable harm to my clients.

DATED this 21 day of August, 2015.


BERTHA M. JARVI

SUBSCRIBED AND SWORN to before me this 21 day of August, 2015.




Notary Public in and for Alaska
My Commission Expires: March 9, 2019

AFFIDAVIT

STATE OF ALASKA)
)
THIRD JUDICIAL DISTRICT) ss.

Amy Elizabeth Oney, being first duly sworn upon oath, deposes and states:

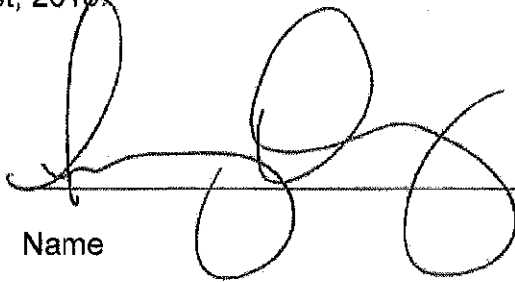
1. I am over the age of eighteen years and am a resident of the Third Judicial District.
2. I am the Administrator of Mama's Assisted Living Homes, Inc. which is comprised of four assisted living homes located in Anchorage, Alaska. Each of the four homes are licensed to care for the frail elderly, adults with dementia, disabled adults, and adults with a mental health diagnosis. I am currently a certified Medicaid provider for the State of Alaska, and have been since opening in September, 2002.
3. Unable to offer affordable health insurance to my 20+ employees, my caregivers often represent the exact population that expansion is targeting. Medicaid expansion will be a disincentive to work for my employees on the cusp of eligibility, as they will reduce their hours to qualify for the entitlement program. Since the beginning of ACA, I have seen an increase in employee turnover due an inability to compete with larger care facilities, government agencies, and large non-healthcare companies that are able the offer health insurance.
4. The State of Alaska's current Medicaid system is already overwhelmed by the large scale of the current enrollees. Issues include delayed provider

payments, insufficient rates for providers to cover the costs of expanding regulatory compliance, and the loss of coverage for many of the State's most vulnerable adults. The result is for providers to carry huge receivable balances from state liabilities, increased non-direct care costs, non-competitive employee benefit packages, and market instability of unpredictable qualifying enrollees.

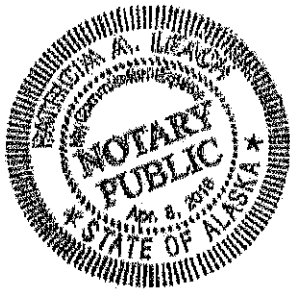
5. If Medicaid expands as planned, I expect a loss of a minimum of 20% of my work force as the result of reduced workable hours by employees who will be applying for the program. In a limited pool of qualified employees, the impact on time, energy, and resources to bring available workers up to our standards of care will be extremely expensive with no immediate opportunity to recover the costs. I am currently serving 75-80% Medicaid clients with rates that have not been adjusted in the 13 years I have been in business (less a modest inflationary rate adjustment approximately 6 years ago).
6. In the past two years, the vulnerable adults I serve have been the target of budgetary concerns and cut backs. Of 17 clients last year, 2 clients lost Waiver eligibility and 1 was relocated out of our home; 2 never received the expected services and had to relocate out of our home; and 4 others went through the Fair Hearing process to keep their waiver services. With the financial strain apparent for our most vulnerable adults, the increased management of new expansion enrollees will most certainly impact the

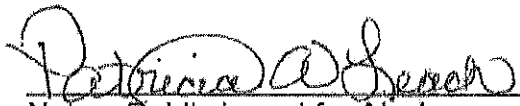
level of care service able to be provided by the State to those at the greatest risk.

DATED this 24th day of August, 2015


Name

SUBSCRIBED AND SWORN to before me this 24 day of August, 2015.




Notary Public in and for Alaska
My Commission Expires: 04.08.2018

AFFIDAVIT OF CRAIG W. JOHNSON

STATE OF ALASKA)
)
THIRD JUDICIAL DISTRICT) ss.

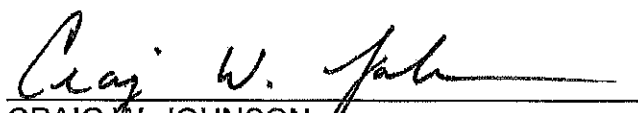
CRAIG W. JOHNSON, being first duly sworn upon oath, deposes and states:

1. I make the following affidavit based on personal knowledge.
2. I am a member of the Alaska State House of Representatives representing District 24, which includes areas of Southwest Anchorage south of Dimond Boulevard and west of the New Seward Highway.
3. I have served in the Alaska State House continuously since first being elected in 2006.
4. Currently, and for the past five years, I have served as a member of House Leadership as the Rules Committee Chairman. In that capacity I am responsible for ensuring required parliamentary rules are followed and legal requirements are met during the passage and enactment of legislation. It is only by ensuring the rules are followed that the legislature can best assure that the laws it passes will be found constitutional.
5. As Rules Chairman, I am also familiar with the constitutional responsibilities between local and state governmental entities.
6. Article 2, Section 1 of the Alaska Constitution clearly and unequivocally vests all legislative power solely with the Alaska Legislature. No other branch of state government is authorized lawmaking power under the Alaska Constitution. The "power of the purse" is solely the prerogative and constitutional responsibility of the legislature. There is no doubt about that.
7. Article 9, Section 13 of the Alaska Constitution states: "No money shall be withdrawn from the treasury except in accordance with appropriations *made by law*. No obligation for the payment of money shall be incurred except as *authorized by law*" (emphasis added) Laws can only be passed by the legislature, the branch of government uniquely designed for that purpose and duly elected by the people to do so.
8. Moreover, Alaska law is also very specific and confining with regard to any expansion of Medicaid. AS 47.07.020(d) states: "[a]dditional groups may not be added unless approved by the legislature." Under any reasonable legal interpretation, adding an entirely new beneficiary category of single, childless, working adults projected to include at least 20,000-40,000

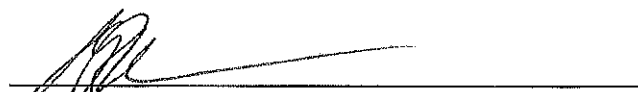
people would constitute "additional groups" under the express language of AS 47.07.020. This new "additional group" is not currently covered because they do not share or meet the criteria needed to qualify for Alaska's existing Medicaid program. Adding them would clearly create an "additional group" for the purposes of AS 47.07.020.

9. The decision by Governor Walker to unilaterally expand Medicaid coverage to a new group of tens of thousands of beneficiaries who are not currently covered by the Medicaid program violates both the letter of Alaska law and the Alaska Constitution because it disregards AS 47.07.020(d) and violates the separation of powers and power of appropriation reserved in the constitution solely for the legislature.
10. Without legislative approval, Governor Walker does not have the constitutional authority to financially encumber future legislatures. The legislature alone has the authority to appropriate funds for state government. The constitution is clear.
11. With the state currently at a critical stage in a number of major projects that require close cooperation and coordination between the legislative and executive branches on issues of statutory enabling language, project funding and implementation, it is imperative that the constitutionally delineated separation of powers is upheld, or irreparable harm will occur to those projects and future projects and to Alaska's system of government.

DATED this 24th day of August, 2015.


CRAIG W. JOHNSON

SUBSCRIBED AND SWORN to before me this 24th day of August, 2015.


Notary Public in and for Alaska
My Commission Expires: W/OFFICE

AFFIDAVIT

STATE OF ALASKA)
)
THIRD JUDICIAL DISTRICT) ss.

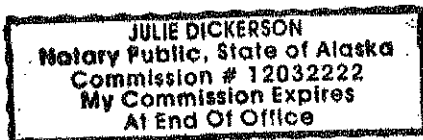
Laura Clark-Maketa, being first duly sworn upon oath, deposes and states:

1. I am over the age of eighteen years and am a resident of the Third Judicial District.
2. I'm a nurse and care provider. I have lived in Alaska for 17 years and worked as a nurse for three years.
3. My patients would be negatively impacted by Medicaid expansion, as evidenced in other states, where they have cut back funding for the most vulnerable populations as a result of Medicaid expansion. The current IDD budget cutback proposal is the first example of the negative impact to the most vulnerable in Alaska (in this case, persons with intellectual and developmental disabilities) as there are only so many state dollars to go around. As an RN, I believe that it is the state and our communities' responsibility to care for the most vulnerable residents, and it is imperative to not jeopardize their care.

DATED this twenty-first day of August, 2015.

Laura Clark-Maketa
Name

SUBSCRIBED AND SWORN to before me this twenty-first day of August, 2015.



Julie Dickerson
Notary Public in and for Alaska
My Commission Expires: at end of office

AFFIDAVIT OF ANNA I. MACKINNON

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

ANNA I. MACKINNON, being first duly sworn upon oath, deposes and states:

1. I make the following affidavit based on personal knowledge.
2. I am a member of the Alaska State Senate representing District G, which includes Eagle River, South Fork Valley, Eagle River Valley, Birchwood and Joint Base Elmendorf Richardson.
3. I served for seven years on the Anchorage Assembly before being elected to the State House in 2006. In 2012 I was elected to the State Senate.
4. I currently serve as the Co-Chair of the Senate Finance Committee, which is responsible for committee level approval of the capital and operating budgets for the state each year. I have served on the Senate Finance Committee since being elected to the State Senate and prior to that I served on the House Finance Committee as a member of the Alaska House of Representatives.
5. I am familiar with the state's budget and the budgetary processes of the state.
6. The Alaska Constitution provides that the legislature must appropriate funds for state government. Each year the legislature must approve an operating budget, a capital budget, and a mental health program budget.
7. Preparation of the budgets each year requires a review of existing state programs and a careful evaluation of how existing and proposed programs are functioning. It also requires a detailed review of requests for funding from local governments, school districts, entities, non-profit groups, and others.
8. A very large proportion of Alaska's revenue comes from taxes on oil and gas production in the state. Beginning in 2014 the price of oil and gas has declined significantly. As a direct result less state revenue is available for appropriation by the legislature.
9. Even when oil prices were high developing a proposed budget was difficult. But since the decline in the price of oil preparing the proposed budgets has become very difficult. The reduced revenue means that even good, well-managed and effective state programs have to be considered

for reductions. Careful consideration must be given to proposals to expand existing state programs because the costs of such expansions are carried forward into future years. Even federally funded programs often require matching funds or administrative costs to be paid by the state.

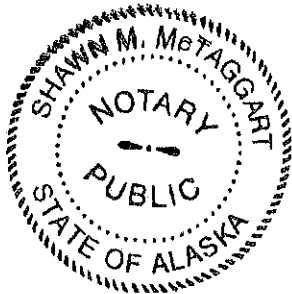
10. The unilateral decision by Governor Walker to expand the Medicaid Program completely disregards the separation of powers and ignores the power of appropriation inherently given to the legislature through our state's constitution.
11. Without legislative review and approval, this decision by Governor Walker will tie the hands of future legislatures, also a violation of our constitution. It will require future legislature to fund significant budgetary increases at a time when the state is facing a multiyear, multibillion-dollar deficit for the foreseeable future. Legislative review and approval of an additional, eligible Medicaid group is not only necessary but also critical in order to understand the financial repercussions for the state.
12. In our current financial situation, we cannot afford to expand and grow programs; we are reducing our spending on programs, including education, public safety, transportation, and health and social services.
13. I understand that if Alaska expands the Medicaid program the federal government will initially pick up the cost. But under current federal law that will end in 2017 and the state will have to pay a gradually increasing portion of that cost. I also understand that for the current year, the Mental Health Trust Authority will pay the administrative costs. But to continue the program after that state funding will be needed. Those facts will mean that other programs will have to be cut to fully fund an expanded Medicaid program. That will mean other spending will be reduced and harm to the beneficiaries of those programs will result. Those cuts could reduce funding for the state troopers, domestic violence shelters and other programs. That harm will be irreparable. You cannot undo an accident caused by a reckless driver or the harm caused by an abusive spouse.
14. I strongly believe that expanding a program that has well known defects and issues will ultimately cost the state even more money. Expanding one program at the expense of other programs without an identified funding source would be dangerous and irresponsible.
15. The legislature has worked hard to make strategic cuts that will not destabilize our economy, but rather start the drawdown of government spending in an effort to prepare for the hard times ahead. Expanding a broken program will add to our already significant shortfall and cause irreparable harm to all state funded programs and agencies.

16. More fundamentally, under our system of government, the legislature passes the laws and makes policy, the governor and the executive branch administers the laws. Without legislative approval the governor cannot spend or accept money for programs. If the governor is allowed to act unilaterally to expand a program the separation of powers which lies at the heart of our system of governmental checks balances is irreparably harmed. Our constitution allocates authority to enact or expand programs and to appropriate money to the legislature not the governor. The governor must follow the law and the budget approved by the legislature.

DATED this 21st day of August, 2015.

Anna I. Mackinnon
ANNA I. MACKINNON

SUBSCRIBED AND SWORN to before me this 21st day of August, 2015.



Shawn M. McTaggart
Notary Public in and for Alaska
My Commission Expires: 9-1-2015

AFFIDAVIT OF CHARISSE E. MILLETT

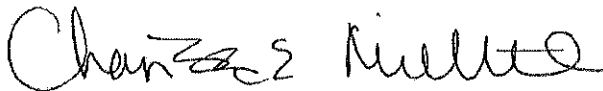
STATE OF ALASKA)
)
THIRD JUDICIAL DISTRICT) ss.

CHARISSE E. MILLETT, being first duly sworn upon oath, deposes and states:

1. I make the following affidavit based on personal knowledge.
2. I am a member of the Alaska State House of Representatives representing District 25, which includes areas east of the Seward Highway south of Tudor road and areas of the lower hillside in South Anchorage, including the Abbott Loop area.
3. I have served in the Alaska State House continuously since first being elected in 2008.
4. I currently serve as a member of House Leadership as the House Majority Leader, and, in that capacity, I am responsible for parliamentary floor motions and coordinating legislative efforts within the House and between the House and the Senate and Governor.
5. I am familiar with the state's budget and the budgetary processes of the state.
6. As House Majority Leader, I am familiar with the constitutional responsibilities and working relationships between local and state governmental bodies and the constitutional responsibilities and working relationships between the state legislative and the executive branches.
7. Article 2, Section 1 of the Alaska Constitution clearly and unequivocally vests all legislative power solely with the Alaska Legislature. No other branch of state government is authorized lawmaking power under the Alaska Constitution.
8. Article 9, Section 13 of the Alaska Constitution states: "No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law."
9. Alaska law is also very specific with regard to expansion of Medicaid. AS 47.07.020(d) states: "[a]dditional groups may not be added unless approved by the legislature."

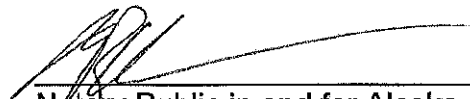
10. The legislature alone can appropriate funds for state government. Each year the legislature approves an operating budget, and a mental health budget, and a capital budget if funds are available.
11. Alaska's existing Medicaid program costs the state more than \$600 million each year, and, even without expansion, Medicaid is the one of the fastest growing components of our state budget.
12. The decision by Governor Walker to unilaterally expand Medicaid coverage to a new group of tens of thousands of beneficiaries who are not currently covered by the Medicaid program violates both the letter of Alaska law and the Alaska Constitution because it disregards AS 47.07.020(d) and the separation of powers and power of appropriation reserved solely for the legislature.
13. Without legislative approval, the decision by Governor Walker will financially encumber future legislatures and violate our state constitution.
14. If the governor's unconstitutional action is not enjoined, irreparable harm will occur to the very structure of our state government in a myriad of ways, with serious and irreversible consequences to our current and future budgets, thus impacting all Alaskans.

DATED this 24th day of August, 2015.



CHARISSE E. MILLETT

SUBSCRIBED AND SWORN to before me this 24th day of August, 2015.


Notary Public in and for Alaska
My Commission Expires: W/COMMISSION

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA LEGISLATIVE COUNCIL,

Plaintiff,

vs.

GOVERNOR BILL WALKER, in his
official capacity as Governor for the State
of Alaska, and VALERIE DAVIDSON, in
her official capacity as Commissioner of
the Department of Health & Social
Services,

Defendants.

Case No. 3AN-15 09208 CI

[PROPOSED]
TEMPORARY RESTRAINING ORDER

The court, having considered the Plaintiff's Motion for a Temporary Restraining Order and any opposition thereto, makes the following **Findings of Fact**:

1. This case involves a statutory and constitutional challenge to the Governor's plan to begin enrolling in Alaska's Medicaid program residents falling within the Medicaid expansion program created by the Affordable Care Act.

I. Medicaid and the Affordable Care Act

2. Medicaid is a cooperative federal-state program through which the federal government reimburses States for a share of their costs if they agree to fund medical assistance to certain qualifying low-income individuals. *See* Social Security Amendments of 1965, Title XIX, *codified at* 42 U.S.C. § 1396 *et seq.* At its inception,

Medicaid offered federal funding to States that agreed to cover individuals deemed “categorically needy” by virtue of their eligibility for four existing social programs. Over time, Congress amended the federal Medicaid statute to require States who wish to remain eligible to receive federal funding to cover pregnant women and children age 5 and under with family incomes below 133% of the federal poverty level, as well as children between the ages of 6 and 18 with family incomes below the federal poverty level. Although Congress offered States the *option* of covering additional individuals, it did not *require* participating states to cover low-income individuals who do not fit into one of these groups of categorically needy. Accordingly, federal law generally did not require states to cover childless adults who are not disabled.

3. Through the Patient Protection and Affordable Care Act (“ACA”), Pub. L. No. 111-148, 124 Stat. 119 (2010), Congress attempted to dramatically expand the conditions a State must satisfy in order to continue participating in Medicaid and receiving federal Medicaid funding. Rather than impose coverage requirements with respect to only certain categories of low-income individuals, the ACA mandated that States expand their programs to provide coverage to *all* individuals under age 65 with incomes up to 133% of the poverty level, with a 5% “income disregard” provision that effectively raised the level to 138%. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII), (e)(14)(I). Although the federal government initially would fund 100% of the costs generated by providing this new coverage, by 2017, States would be responsible for 5% of those costs, with that responsibility increasing to 10% by the end of the decade. *Id.* § 1396d(y). The

ACA also did not offer States any funding beyond the traditional 50% match for administrative costs generated by this expansion. *Id.* § 1396b(a)(2)-(5), (7). Because the ACA structured these new provisions as requirements for continued participation in Medicaid, it was meant to leave States with no choice but to expand their Medicaid programs or forfeit *all* federal Medicaid funds.

II. *NFIB v. Sebelius*

4. Shortly after the ACA's enactment, Alaska joined 25 other States in challenging the constitutionality of Congress' effort to compel States to dramatically expand their Medicaid obligations. The States argued that requiring them to cover this new population as a condition of continued participation in and eligibility for federal funding under Medicaid amounted to unconstitutional coercion that violated their sovereign right to decide for themselves whether expanding their Medicaid programs in the manner contemplated by the ACA is the right decision for their residents.

5. The U.S. Supreme Court agreed. *See Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2601 (2012). As Chief Justice Roberts explained in his controlling opinion, the ACA was no "mere alteration of existing Medicaid," but rather was an attempt to "enlist[] the States in a new health care program." *Id.* at 2606. Yet rather than give States "a legitimate choice whether to accept the [new] federal conditions in exchange for federal funds," Congress attempted to force Medicaid expansion upon them by making it a mandatory condition of continued participation in the preexisting Medicaid program and receipt of federal Medicaid funding. *Id.* at 2602-

03. In short, Congress engaged in “economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.” *Id.* at 2605. That attempt to deprive States of “a genuine choice whether to participate in the new Medicaid expansion” program, the Court concluded, was unconstitutional. *Id.* at 2607.

6. Turning to the question of how to remedy that constitutional violation, the Court recognized that nothing “precludes Congress from *offering* funds under the Affordable Care Act to expand the availability of health care, and requiring that States *accepting* such funds comply with the conditions on their use.” *Id.* (emphasis added). The constitutional problem arose because Congress attempted to require States to comply with those new conditions (*i.e.*, expand their Medicaid programs) even if, given a genuine choice in the matter, they would reject both the new conditions and the new funds to which they attached. The Court thus decided that the best way to remedy the constitutional violation was to make the new conditions a requirement only for “a State that has chosen to participate in the expansion” and accept the federal funding that comes with it, not for “States that choose not to participate in that new program.” *Id.*

7. To that end, the Court held that 42 U.S.C. § 1396c, the statutory provision that gives the Department of Health & Human Services (“HHS”) authority to withhold funds from a State that fails “to comply substantially with any” requirement under the Medicaid Act, could not be applied to withhold funds based on a State’s “failure to comply with the requirements set out in the expansion.” *NFIB*, 132 S. Ct. at 2607. “That fully remedie[d] the constitutional violation” because it ensured “that States would have

a genuine choice whether to participate in the new Medicaid expansion.” *Id.* If a State chooses to participate, then HHS may still invoke section 1396c to withhold funds “provided under the Affordable Care Act if [the] State ... fails to comply with the requirements of that Act.” *Id.* But if a State chooses not to participate in Medicaid expansion, HHS may not treat the State as having failed “to comply substantially with” a provision of the Medicaid Act.” *Id.* “As a practical matter, that means States may now choose to reject the expansion; that is the whole point.” *Id.* at 2608.

8. In the wake of *NFIB*, many States have chosen to do just that. At the moment, 19 States (not including Alaska) have exercised their constitutional prerogative not to participate in Medicaid expansion. The federal government has never suggested that any of these States is in violation of any of the requirements of the Medicaid statute. Instead, both HHS and the Centers for Medicare & Medicaid Services (“CMS”) have reiterated repeatedly that, after *NFIB*, participation in Medicaid expansion is an option, not a requirement. In a March 6, 2015 letter to Governor Walker, HHS Secretary Sylvia Burwell described Medicaid expansion as a “coverage category elected at state option” and reiterated that “Alaska *may* take up the Medicaid coverage expansion, and then later drop it *at state option*.” (emphasis added).

III. Alaska’s Medicaid Statute

9. Alaska decided to begin participating in Medicaid in 1972, and the Legislature enacted the State’s Medicaid statute that same year. *See* SLA 1972, ch. 182 § 1.

10. Mirroring the federal Medicaid statute, the Alaska statute draws a distinction between groups for whom coverage is mandatory and groups for whom it is optional. To ensure that Alaska remains eligible at all times to continue receiving federal Medicaid funding, subsection (a) declares eligible for coverage under the State's program "[a]ll residents of the state for whom the Social Security Act requires Medicaid coverage." Alaska Stat. § 47.07.020(a). Subsection (b) also declares eligible an additional 15 "optional groups of persons for whom the state may claim federal financial participation." *Id.* § 47.07.020(b). Subsection (d) states that "[a]dditional groups may not be added unless approved by the legislature." *Id.* § 47.07.020(d).

IV. The Governor's Efforts to Achieve Medicaid Expansion in Alaska

11. The population covered by the ACA's Medicaid expansion—*i.e.*, individuals who are under age 65, have an income level at or below 138% of the poverty level, and for whom coverage was not mandatory before the ACA—are not among the 15 "optional groups" for whom the Alaska Legislature has authorized Medicaid coverage. On March 17, 2015, Governor Walker transmitted bills to the Legislature that would have made those individuals the sixteenth "optional group[]" of persons for whom the state may claim federal financial participation" under section 47.07.020(b). Ultimately, the Legislature did not pass Governor Walker's bills or otherwise approve participation for Alaska in Medicaid expansion. Instead, on June 11, 2015, the Legislature passed on appropriations act for the current fiscal year¹ that prohibits the

¹ Fiscal Year 2016 begins July 1, 2015 and ends June 30, 2016.

Governor from using funds appropriated for Medicaid on Medicaid expansion. 2015 Alaska Laws 2nd Sp. Sess. Ch. 1, § 1.

12. On July 16, 2015, the Governor informed the Legislative Budget and Audit Committee (LB&A Committee) that he intended to begin enrolling Alaska residents who fall within the Medicaid expansion population in the State's Medicaid program with or without the Legislature's approval.

13. Although the Governor has no authority to accept federal funds for a new expenditure without approval from the Legislature, he claimed that accepting federal funding to cover the Medicaid expansion population would fall within his authority to accept an increase in federal funding for an existing appropriation item. This is so, according to the Governor, because notwithstanding the Supreme Court's decision in NFIB, he views the ACA's expansion population as a group "for whom the Social Security Act requires Medicaid coverage," Alaska Stat. § 47.07.020(a). The Governor also announced that he would appropriate money from the Alaska Mental Health Trust Account to help cover implementation costs and that the Department of Health and Social Services (DHSS) would assist in implementing the new program.

14. By statute, the Governor must give the LB&A Committee 45 days to review any new expenditure before it may be put into effect. This 45-day stay on the Governor's planned Medicaid expansion expenditure will lapse on August 30, 2015, and the Governor has announced that if, as anticipated, the LB&A Committee takes no

action to prevent him from doing so before then, he will begin enrolling the expansion population in Medicaid on September 1, 2015.

The Court also makes the following **Conclusions of Law**:

I. Standard of Review

1. Under Alaska Rule of Civil Procedure 65(b), this Court may enter a temporary restraining order without written or oral notice to the adverse party if two conditions are met:

(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

II. The Legislative Council's Challenge To The Governor's Attempt To Unilaterally Opt Alaska Into The ACA's Optional Medicaid Expansion Program Is Likely To Succeed On The Merits.

2. The Legislative Council has made a clear showing that it is likely to succeed on the merits by establishing that the Governor's attempt to unilaterally opt Alaska into Medicaid expansion would violate section 47.07.020(d), the 2016 appropriations act, and the separation of powers that the Alaska Constitution mandates, as the Medicaid expansion population is an optional group that cannot be added to the State's Medicaid program without approval that the Legislature has not given.

3. In the wake of the Supreme Court's decision in *NFIB v. Sebelius*, participation in Medicaid expansion is an option, not a requirement for continued

participation in Medicaid. As Chief Justice Roberts explained, ensuring that “States may now choose to reject the expansion” was “the whole point” of the Court’s decision. *NFIB*, 132 S. Ct. at 2608. That means that each State’s decision whether to participate in Medicaid expansion must be arrived at through the same legislative and constitutional processes that the State follows when deciding whether to cover any other group for whom Medicaid coverage is optional under federal law.

4. In Alaska, to ensure that the State remains eligible to continue participating, the statute automatically authorizes coverage for anyone falling into the “required” category. But for any group that does not fall into that category, coverage is available only if that “optional group” is expressly authorized by the Legislature. And “[a]dditional groups may not be added” to the statutorily enumerated list of optional groups “unless approved by the legislature.” *Id.* § 47.07.020(d).

5. The group of individuals for whom federal funding is available under the ACA’s Medicaid expansion program is not one of the 15 “optional groups” enumerated in section 47.07.020(b). If they are to be covered under Alaska’s program, then, they must qualify as a group “for whom the Social Security Act requires Medicaid coverage.” Alaska Stat. § 47.07.020(a). The Legislative Council has a strong showing that the Medicaid expansion group does not fall within this provision, and that the Governor’s attempt to unilaterally extend coverage to that group therefore violates section 47.07.020(d). As the Supreme Court, the relevant federal agencies, numerous States,

and the Governor have recognized, States are no longer required to cover the Medicaid expansion population after the Court's decision in *NFIB*.

6. The Legislative Council also has made a strong showing that it is likely to prevail on its claim that the Governor's plan violates the 2016 appropriations act, 2015 Alaska Laws 2nd Sp. Sess. Ch. 1, § 1, and "the separation of powers and its complementary doctrine of checks and balances [that] are part of the constitutional framework of this state." *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 34-35 (Alaska 2007). The Alaska Constitution gives "the legislature, and *only* the legislature, ... control over the allocation of state assets among competing needs." *City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153, 1156 (Alaska 1991); *see also* Alaska Const. art. II, § 1. The Governor usurps that "legislative appropriation power" not only when he attempts to appropriate funds unilaterally, but also when he "[a]lter[s] the purpose of [an] appropriation," *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 372 (Alaska 2001).

7. The Legislative Council has made a strong showing that the Governor is attempting to do both. He plans to begin funding Medicaid expansion notwithstanding an appropriations act that expressly prohibits him from using appropriated funds to expand Medicaid, and to do so under a theory that is irreconcilable with the intent of the Legislature's existing appropriation for Medicaid funding. The purpose of the appropriation of funding to cover groups "for whom the Social Security Act requires Medicaid coverage" is clear: The Legislature wanted to appropriate the funds necessary

to ensure that Alaska remains in compliance with all conditions on continued participation in and receipt of federal funding under Medicaid. It did not intend to divest itself of its constitutional power to decide whether to appropriate funding for groups for whom coverage is not required under federal law.

8. Both the Legislative Council and the people of Alaska are likely to suffer immediate and irreparable injury if the Governor proceeds with his plan to begin enrolling the expansion population on September 1, 2014.

9. First, a violation of a state statute constitutes a per se irreparable injury. *See, e.g., SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 508 (Pa. 2014) (“where the offending conduct sought to be restrained through a preliminary injunction violates a statutory mandate, irreparable injury will have been established”); *State v. Econ. Freedom Fund*, 959 N.E.2d 794, 804 (Ind. 2011) (“if the action to be enjoined clearly violates a statute, the public interest is so great that the injunction should issue regardless of whether a party establishes ‘irreparable harm’ or ‘greater injury’”); *Jurisich v. Jenkins*, 749 So. 2d 597, 599 (La. 1999) (“petitioner is entitled to injunctive relief without the requisite showing of irreparable injury when the conduct sought to be restrained is unconstitutional or unlawful”).

10. A violation of the Alaska Constitution also constitutes irreparable injury. *See Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”); *Planned Parenthood of Minn., Inc. v. Citizens for*

Cnty. Action, 558 F.2d 861, 867 (8th Cir. 1977); *Alsworth v. Seybert*, 323 P.3d 47, 55 (Alaska 2014); *cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976). As the Alaska Supreme Court has explained, the separation-of-powers principles embodied in the Alaska Constitution serve “two principal purposes: first, to protect the liberty of the citizen; and second, to safeguard the independence of each branch of the government and protect it from domination and interference by the others.” *Bradner v. Hammond*, 553 P.2d 1, 6 n.11 (Alaska 1976). By usurping the Legislature’s constitutional appropriations power, the Governor would cause irreparable injury to the rights not just of the Legislature, but of the Alaska citizenry.

11. The Governor’s plan also threatens to engender massive confusion and foster unfounded reliance interests on the part of the Alaskans who will be given the erroneous impression that they are covered by Medicaid when that may not, in fact, be so. *See* Aff. Rep. Mike Chanault ¶ 19; Aff. Sen. Pete Kelly ¶ 12; William Streur ¶ 14. And should coverage actually begin to flow only to later be determined unlawful, the Governor’s actions could result in an administrative nightmare in which providers are billing Alaska’s Medicaid program for patients and care that it does not cover. *See See* Aff. Sen. Pete Kelly ¶ 12.

12. Moreover, Alaska’s Medicaid program is already stretched thin. *See* Aff. Linda Giani ¶¶ 3-4; Aff. Bertha Jarvi ¶¶ 4-6; Aff. Sen. Pete Kelly ¶ 9; Amy Oney ¶ 4. The stress to the system of adding—and later removing—tens of thousands of beneficiaries threatens to significantly diminish the quality of care available to current

Medicaid beneficiaries. *See* Bertha Jarvi ¶¶ 4-6; Aff. Sen. Pete Kelly ¶ 9; Aff. William Streur ¶¶ 8, 14. Patients and providers alike thus stand to suffer irreparable injury if the Governor moves forward with his plan to begin implementing coverage for the expansion population without the necessary legislative approval on September 1.

13. That potential injury is compounded by the certain irreparable injury to the State fisc. Each dollar that the Governor diverts to implementing Medicaid coverage that is not authorized by state law is a dollar that could go to a State program that the Legislature actually has authorized. The Alaskans who stand to benefit from the expenditure of funds on those *authorized* programs thus would inevitably be injured by the Governor's attempt to implement an unauthorized expansion of Medicaid. *See* Rep. Mike Chenault ¶¶ 7-8, 18; Aff. Bertha Jarvi ¶¶ 4-6; Aff. Rep. Johnson ¶ 11; Aff. Laura Clark-Maketa ¶ 3; Aff. Anna McKinnon ¶¶ 12, 15.

14. The Governor's plan to divert \$1.6 million from the Mental Health Trust Authority Account to pay for administering that new coverage is particularly problematic. That money, which should be promoting mental health programs for vulnerable Alaskans, *see* Alaska Stat. § 37.14.035, could instead be lost to implementing and administering an unlawful unilateral executive initiative, causing irreparable harm to the beneficiaries of the Trust. *See* Aff. Sen. Pete Kelly ¶ 8; Aff. William Streur ¶ 10.

15. The State's budget is already tightly constrained. *See* Aff. Mike Chenault ¶¶ 7-8; Aff. Sen. Pete Kelly ¶ 7; Aff. Anna McKinnon ¶¶ 8-9, 12, 15; Rep. Charisse

Millett ¶¶ 11, 14. The Governor should not be diverting scarce resources to implementing and administering unilateral executive action that may ultimately need to be unwound.

16. Preliminary relief does not pose any substantial harm to the Governor. This case presents straightforward issues of statutory and constitutional interpretation that this Court can resolve quickly. If the Governor is correct that he has had the authority to opt into Medicaid Expansion since he assumed office in January 2015, then he will not suffer any significant harm by having to wait until this case is fully resolved to implement his plan. Thus, any injury to the Governor “is relatively slight in comparison to the injur[ies]” the Legislature and the State will suffer if the Governor’s Medicaid expansion plan is implemented before this Court examines the legal grounds on which it rests. *N. Kenai Peninsula Rd. Maint. Serv. Area v. Kenai Peninsula Borough*, 850 P.2d 636, 639 (Alaska 1993).

17. Accordingly, the Court grants the Legislative Council’s motion for a temporary restraining order.

IT IS THEREFORE ORDERED:

1) Unless and until this Court orders otherwise, the Governor and the Department of Health & Social Services Commission are enjoined from enrolling Alaska residents within the ACA’s Medicaid expansion population in Alaska’s Medicaid program, accepting federal funding for Medicaid coverage for that expansion population, expending state resources on implementing coverage for that population, or otherwise implementing or administering Medicaid expansion, unless the Alaska

Legislature expressly approves the expansion population as an "additional group" pursuant to Alaska Statute § 47.07.020(b), (d).

2) A hearing on the Motion shall be held before the Honorable _____ at _____ .m. on _____ 2015, in Courtroom _____.

Dated this ____ day of _____, 2015.

Superior Court Judge

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